

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,203

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

DEC 11 1957

JOHN E. DAY, JR.,

v.

976

Frank D. Stewart
Appellant,
CLERK

NEIL H. McELROY, Secretary of Defense

WILBER M. BRUCKER, Secretary of the Army

and

MAXWELL D. TAYLOR, Chief of Staff, U. S. Army,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

This appeal from the order of the United States District Court for the District of Columbia dismissing appellant's petition and amended petition for the writ of habeas corpus presents two questions:

(1) Whether, charges against appellant having duly come into the hands of the Commanding General, Eighth Army, having general court-martial jurisdiction over appellant, transmittal of the charges against appellant to the Commanding General, I Corps, a subordinate of the Commanding General, Eighth Army, is unlawful with the result that the said subordinate lacked general court-martial jurisdiction over appellant.

(2) Whether the denial to the appellant of due process of law and equal protection of the laws by the United States Court of Military Appeals which, in affirming the conviction and sentence of appellant, failed in this instance to apply a recognized mandate of the Uniform Code of Military Justice¹ in respect of the law officer's instructions, entitles appellant to the writ of habeas corpus and to a discharge from custody.

¹ The Act of May 5, 1950, c. 169, 64 Stat. 107, 50 U.S.C., Sections 551 et seq.

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 14,203

JOHN E. DAY, Jr.,

Appellant,

v.

NEIL H. McELROY, Secretary of Defense
WILBER M. BRUCKER, Secretary of the Army
and

MAXWELL D. TAYLOR, Chief of Staff, U. S. Army,

Appellees.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, alleging that he was illegally detained in Japan under color of the authority of the United States in the custody of Headquarters, Japan Logistical Command, Japan, which was under the authority of and responsible to respondents, all of whom were within the jurisdiction of the United States District Court for the District of Columbia, filed a petition for the writ of habeas corpus in the said District Court (App. 1 - 5). By leave of court, appellant, alleging that he is illegally detained under color of the authority of the United States in the custody of the Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas, who is under the authority of and responsible to appellees, all of whom are within the jurisdiction of the United States District Court for the District of Columbia, filed an amended petition for the writ of habeas corpus in the said District Court (App. 10 - 17).

The petition and amended petition were premised upon Article I, Section 9, Clause 2, of the Constitution of the United States, and upon the Act of June 25, 1948, c. 646, 62 Stat. 964, 28 U.S.C., Section 2241(a), providing in pertinent part that "Writs of habeas corpus may be granted by * * * the district courts and any circuit judge within their respective jurisdictions * * * ."

The District Court, on September 30, 1957, dismissed appellant's petition and amended petition (App. 37). Appellant filed notice of appeal from the order of dismissal on October 14, 1957 (App. 37-38). The jurisdiction of this Court to entertain the appeal is founded upon the Act of June 25, 1948, c. 646, 62 Stat. 929, as amended, 28 U.S.C., Section 1291, providing in part that the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, and the same Act, 62 Stat. 967, as amended, 28 U.S.C., Section 2253, providing in pertinent substance that, in a habeas corpus proceeding before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

STATEMENT OF THE CASE

THE CAUSE OF APPELLANT'S DETENTION

The purported cause of appellant's detention is his trial, conviction and sentence to death by general court-martial convened in Korea, October 1, 1951, for murder in violation of Article of War 92, 10 U.S.C., Section 1564, and for assault with a deadly weapon with intent to do great bodily harm in violation of Article of War 93, 10 U.S.C., Section 1565, together with the review proceedings thereon (App. 10-12). The court-martial proceedings were approved by the convening authority and the record forwarded to the Office of the Judge Advocate General for appellate review (App. 11). On February 29, 1952, a Board of Review in the Office of the Judge Advocate General affirmed the conviction and sentence (App. 11). Upon mandatory review, the United States Court of Military Appeals, with one judge dissenting, on

April 30, 1953, affirmed the holding of the Board of Review (App. 11). On June 30, 1954, the conviction and sentence were confirmed and ordered executed by the President of the United States assuming to act under Article 71(a), Uniform Code of Military Justice, 50 U.S.C., Section 658(a) (App. 11 - 12).

THE FACTS SURROUNDING APPELLANT'S CONTENTIONS

Appellant bases his contention that his continuing restraint and imprisonment are unlawful on two principal grounds: that the general court-martial which tried, convicted and sentenced appellant was without jurisdiction over him in that the convening authority of the said general court-martial lacked court-martial jurisdiction over appellant; and that appellant's trial, conviction, sentence and review proceedings thereon are null and void in that, in the course of such review proceedings, the United States Court of Military Appeals denied to appellant due process of law and the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States.

a. The purported transfer of general court-martial jurisdiction over appellant.

Appellant was a member of the 69th Transportation Truck Battalion (App. 39). As such, he was attached, for purposes of general court-martial jurisdiction, to Eighth Army (App. 12,40). Lieutenant General Van Fleet, then commanding the Eighth United States Army Korea (EUSAK) was, therefore, the officer with general court-martial jurisdiction over appellant (App. 29). The convening authority of the general court-martial which tried, convicted and sentenced appellant was Major General John W. O'Daniel, commanding I Corps, a subordinate of the Commanding General, Eighth Army (App. 41 - 42).

Charges were preferred against appellant May 13, 1951 (App. 39). Following an investigation of the charges pursuant to letter orders issued May 17, 1951 (App. 39), the letter orders and the charges

were forwarded through channels, and with a recommendation for trial by general court-martial, to the Commanding General, Eighth Army, on or about June 24, 1951 (App. 40). The letter orders and the charges reached Eighth Army Headquarters, thereby officially coming into the hands of General Van Fleet, the commanding officer exercising general court-martial jurisdiction over appellant, some time between June 24 and June 27, 1951 (App. 41). On June 27, 1951, Colonel Chester D. Silvers, Staff Judge Advocate, Eighth Army, without consulting General Van Fleet and without any participation therein or knowledge thereof on the part of General Van Fleet, purported to effect a transfer of court-martial jurisdiction over appellant from the Commanding General, Eighth Army, to the Commanding General, I Corps, by preparing and causing to be sent an indorsement to the letter orders of May 17, 1951, requesting, "In view of the circumstances," that I Corps "exercise disciplinary jurisdiction in subject case" (App. 29,31,41). The Commanding General, Eighth Army, had no contact whatever with the case (App. 29-31). It was in this manner that the charges against appellant reached the Commanding General, I Corps, who thereafter purported to act as convening authority of the general court-martial which tried, convicted and sentenced appellant.

b. The Court of Military Appeals and the law officer's instructions

At appellant's trial before the general court-martial convened in Korea October 1, 1951, the evidence introduced respecting the charge of premeditated murder in violation of Article of War 92 fairly raised the lesser included offense of unpremeditated murder as a reasonable alternative to the offense charged (App. 15). Cf. United States v. Day, 2 USCMA 416, 9 CMR 46, 53 (1953). The law officer of the said court-martial did not instruct the said court-martial as to the elements of the lesser included offense of unpremeditated murder (App. 15).²

²

The law officer's instructions are set forth in full at App. 42-45.

The failure of the law officer to instruct the court-martial as to the elements of the lesser included offense of unpremeditated murder was assigned as error to the Board of Review which, on February 29, 1952, affirmed appellant's conviction and sentence. United States v. Day, 8 CMR 424, 432 (1952). The Board of Review held, in this connection, that "Where, as in this case, the accused was found guilty of the principal offense charged, and the only reasonable conclusion which is justified by the evidence is guilt of the principal offense, no error results in the failure of a law officer to instruct the court as to the elements of any lesser included offenses," especially where the defense acquiesces in the instructions given. United States v. Day, 8 CMR 424, 432 (1952) (emphasis supplied).

The failure of the law officer to instruct the court-martial as to the elements of the lesser included offense of unpremeditated murder was assigned as error to the United States Court of Military Appeals. See United States v. Day, 2 USCMA 416, 9 CMR 46, 53 (1953). The Court of Military Appeals, unable to accept the Board of Review's plain departure from the mandate of the Uniform Code of Military Justice,³ 50 U.S.C., Sections 551 et seq., rested its affirmance on the ground that "there was, for all practical purposes, such an instruction given." United States v. Day, 2 USCMA 416, 9 CMR 46, 53 (1953) (emphasis supplied).

The late Judge Brosman, dissenting, made it clear that (Ibid, 9 CMR 46, 59):

"The Code and the Manual say -- and this Court has heretofore repeatedly held -- that the law officer must instruct the court on the elements of the offense charged and as to lesser offenses fairly raised as reasonable alternatives to that charged. [Citations omitted.] That just was not

³

On February 29, 1952, the same day appellant's conviction and sentence were approved by the Board of Review, United States v. Clark, 1 USCMA 201, 2 CMR 107 (1952) was decided. In Clark, the Court of Military Appeals enunciated the principle that the law officer is required to instruct the court as to the elements of lesser included offenses reasonably raised by the evidence.

done here! And this failure constitutes clear prejudicial error -- as any student of the opinions of this Court would reasonably expect. * * * I simply refuse to agree with the completely untenable notion that within each proper instruction on premeditated murder there is included an adequate instruction on the unpremeditated offense." (emphasis in original)

The failure of the law officer to instruct the court-martial as to the lesser included offense of unpremeditated murder was assigned as error to the President, without effect (App. 45-46).

THE PETITION AND AMENDED PETITION FOR THE WRIT OF HABEAS CORPUS AND PRIOR JUDICIAL PROCEEDINGS

On August 10, 1954, while confined in Japan under sentence of death, appellant filed a petition for the writ of habeas corpus in the United States District Court for the District of Columbia (App. 1-5). On September 9, 1954, the District Court dismissed the petition (App. 22,31). An appeal therefrom to this Court was filed October 8, 1954, but its prosecution was postponed. In the meantime, appellant was returned to the United States, was confined at Fort Leavenworth, Kansas, and filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas. The writ was issued, but was afterwards discharged, and the United States Court of Appeals for the Tenth Circuit affirmed the order discharging it. Day v. Davis, 235 F. 2d 379 (10th Cir. 1956), cert. denied 352 U. S. 881 (1956), rehearing denied 352 U.S. 913 (1956). See Day v. Wilson, et al., _____ U.S. App. D.C. _____, 247 F. 2d 60 (1957).

On April 25, 1957, the 1954 order of the United States District Court for the District of Columbia dismissing appellant's petition was reversed by this Court and the case was remanded to the District Court for further proceedings. Day v. Wilson, et al., _____ U.S. App. D.C. _____, 247 F. 2d 60.

On May 16, 1957, by leave of the United States District Court for the District of Columbia, appellant filed an amended petition for the writ of habeas corpus in the said District Court (App. 10-17). Appellant is confined (unlawfully, according to the amended petition) under color of the authority of the United States in the custody of the Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas (App. 11). The said Commandant is under the authority of and responsible to the appellees who are within the jurisdiction of the District Court (App. 11).

Upon the filing of the amended petition the District Court directed to the appellees a rule to show cause why a writ of habeas corpus should not be issued (App. 18). The appellees having filed their return and answer to the amended petition for writ of habeas corpus and the order to show cause issued thereon, the District Court on September 30, 1957, ordered, in accordance with its opinion dated the same day, that the petition and amended petition for a writ of habeas corpus be dismissed and the rule to show cause discharged (App. 37). This appeal followed.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The relevant constitutional provision, statute, and regulations are set forth in Appendix A, infra.

STATEMENT OF POINTS

1. The District Court erred in dismissing the petition and amended petition for a writ of habeas corpus upon the ground that the general court-martial which tried, convicted, and sentenced appellant had jurisdiction to do so.

2. The District Court erred in dismissing the petition and amended petition for a writ of habeas corpus upon the ground that the denial to appellant of due process of law and the equal protection of the laws by the

United States Court of Military Appeals is not remediable upon habeas corpus.

SUMMARY OF ARGUMENT

Important issues affecting the jurisdiction of courts-martial and the duty of the federal civilian courts to protect fundamental rights of military accused are presented by this case. May a soldier be tried by a court-martial convened by a subordinate of the general officer into whose hands charges against the soldier duly came? If so, may the transfer of charges from superior command to inferior one be made without the knowledge of the said general officer? And, if the court-martial has jurisdiction notwithstanding the above, are the federal courts powerless on habeas corpus to protect the soldier from a deprivation of due process of law and the equal protection of the laws by a military tribunal? The answer to each of these questions is "No" under the circumstances here disclosed.

I

The question of whether a court-martial possesses jurisdiction over the person, the absence of which renders its pronouncements null and void, is always open to inquiry on habeas corpus. The letter and the spirit of the law establish in this case that the general court-martial which tried, convicted and sentenced appellant was without jurisdiction in that the convening authority of the said general court-martial, a subordinate of the general officer possessing general court-martial jurisdiction over appellant, lacked court-martial jurisdiction over appellant.

II

The Supreme Court has effectively determined that the federal courts have the power, and the duty, to remedy on habeas corpus the deprivation of fundamental constitutional rights on review of court-martial proceedings by military tribunals, where no other means of

correcting an unlawful restraint on human liberty is available. In the exceptional circumstances of this case, the propriety of, and the necessity for, exercise of the undoubted power of the federal courts in this respect is plain.

ARGUMENT

I

THE GENERAL COURT-MARTIAL WHICH TRIED, CONVICTED AND SENTENCED APPELLANT WAS WITHOUT JURISDICTION OVER HIM.

In fulfilling the delicate and difficult task of striking a proper balance between due regard for the writ of habeas corpus and adherence to the traditional principle of non-interference by federal civilian courts with matters constitutionally committed to the military, the civilian courts have long and uniformly exercised the power to inquire on habeas corpus whether a court-martial possessed jurisdiction of the person accused. Burns v. Wilson, 346 U.S. 137 (1953); Hiatt v. Brown, 339 U.S. 103 (1950); McClaughry v. Deming, 186 U.S. 49 (1902); In re Grimley, 137 U.S. 147 (1890).

Appellant contends that the general court-martial which tried, convicted and sentenced him was without jurisdiction over his person in that the convening authority of the said general court-martial lacked general court-martial jurisdiction over him for the reasons set forth hereinbelow.

- a. The Commanding General, Eighth Army, had no power to transmit charges against appellant received by him to his subordinate commanding I Corps who thereafter purported to act as convening authority.

In accordance with law and military custom, the charges against appellant were forwarded, through the chain of command, to the Commanding General, Eighth Army. When the charges reached the Commanding General, Eighth Army, they officially came into the hands of

the commanding officer possessing general court-martial jurisdiction over appellant.

Assuming, arguendo, that the charges against appellant were transferred from Eighth Army to I Corps by the Commanding General, Eighth Army, it is appellant's position that the transfer was invalid and contrary to the Uniform Code of Military Justice,⁴ 50 U.S.C., Sections 551, et seq., and the Manual for Courts-Martial, United States, 1951,⁵ and, therefore, that the general court-martial which tried, convicted and sentenced appellant was without jurisdiction in that the Commanding General, I Corps, who became the convening authority of the said general court-martial, lacked general court-martial jurisdiction over appellant.

Careful reading of Article 22, Uniform Code of Military Justice, 50 U.S.C., Section 586, and of Paragraph 35, Manual for Courts-Martial, United States, 1951, makes it clear that a commanding officer possessing general court-martial jurisdiction over an accused is prohibited from disposing of charges against an accused duly received by him by transferring them to a subordinate command for trial by general court-martial convened by the commanding officer of the subordinate command.

Article 22 vests jurisdiction to convene general courts-martial in the commanding officers of both an Army and an Army Corps. Where, however, charges against an accused are duly forwarded to the commanding officer of an Army, the commanding officer of an Army Corps, a subordinate command, then can have no jurisdiction to convene a general court-martial for the trial of an accused on those particular charges.⁶ This is clearly implied from the explicit treatment, in Article 22, of

⁴ Hereinafter sometimes cited as "U.C.M.J."

⁵ Hereinafter sometimes cited as "M.C.M., 1951".

⁶ See also paragraph 5a(3), M.C.M. 1951.

transfer of general court-martial jurisdiction from inferior to superior competent authority, and by striking silence respecting such transfer from superior competent authority to inferior commanders.⁷

Any doubt in this respect which may remain after reading Article 22 is effectively removed by consideration of paragraph 35, M.C.M., 1951. Paragraph 35 provides in pertinent substance that the Commanding General, Eighth Army, was empowered, with respect to the disposition of the charges against appellant received by him some time between June 24 and June 27, 1951, "to refer them for trial to a general court-martial convened by him, to authorize the trial of certain capital cases by inferior courts-martial, or, in lieu of trial, to impose forfeitures of pay in appropriate cases upon officers and warrant officers of his command under the provisions of Article 15." In addition, he might have taken or directed the taking of "any action on the charges which the immediate commander (32) or the officer exercising summary court-martial jurisdiction (33) is authorized to take."⁸

The Manual for Courts-Martial, United States, 1951, was promulgated by the President of the United States in implementation of the Uniform Code of Military Justice. Executive Order 10214, February 8, 1951, 16 F. R. 1303. Where not inconsistent with law, it has the force and effect of law. See Jackson v. Taylor, _____ U.S. _____, 1 L. ed. 2d 1045 (1957); United States v. Lucas, 1 USCMA 19, 1 CMR 19 (1951). Paragraph 35 is far from inconsistent with law.

It should be borne in mind that a court-martial is the creature of statute, a tribunal of limited and special jurisdiction and, if not convened in strict conformity with law, it is without jurisdiction and its pronouncements are absolutely void. McClaghry v. Deming, 186 U.S.

⁷ The charges having come into the hands of the Commanding General, Eighth Army, the presence or absence of command relationship between the Commanding General, I Corps, and appellant is thereafter immaterial.

⁸ Paragraphs 32 and 33, M.C.M., 1951, govern the action which the immediate commander or the officer exercising summary court-martial jurisdiction may take with respect to charges or information received by them. Such action may consist of a preliminary inquiry, preference of charges, dismissal of charges, non-judicial punishment, or forwarding of charges to superior competent authority (paragraph 32) or of a preliminary inquiry, informing accused of charges, minor alterations, ordering an investigation, dismissal of charges, non-judicial punishment, reference of the charges to trial by summary court-martial convened by him, or forwarding charges to superior competent authority (paragraph 33).

49, 63 (1902); Dynes v. Hoover, 20 How. 65, 80 (1858); Runkle v. United States, 122 U.S. 543, 555 (1887). As Article 22 expressly designates those who have authority to convene general courts-martial, it follows that no one else has this authority and that anyone having this authority can transfer it only in accordance with Article 22. Paragraph 5a(5), M.C.M., 1951. As Paragraph 35, M.C.M. 1951, having the force and effect of law, expressly designates the powers which may be exercised by one having general court-martial jurisdiction over a soldier-accused upon receiving charges against him, it follows that the exercise of any supposed power not so designated is invalid. See Botany Worsted Mills v. United States, 278 U.S. 282 (1929).

When, therefore, the Commanding General, Eighth Army, received charges against appellant, he was prohibited by law from disposing of those charges by transmitting them to his subordinate commanding I Corps. Whether the Commanding General, I Corps, could convene general courts-martial for the trial of some accused is not the question. The issue is whether he could convene a general court-martial for the trial of appellant, in the circumstances here present. It is respectfully submitted that the Commanding General, I Corps, lacked general court-martial jurisdiction over appellant. His action as convening authority of the general court-martial which tried, convicted and sentenced appellant is, therefore, null and void, as are appellant's trial, conviction and sentence.

This has long been the law. Article 22 is derived from Article of War 8, 41 Stat. 788. Paragraph 76(a)(12), Manual for Courts-Martial, 1921, promulgated by the President in implementation of Article of War 8, provides in pertinent part that "Each commanding officer superior to the one immediately exercising summary court-martial jurisdiction over the accused, into whose hands charges may officially come, will either dismiss them, dispose of them under the one hundred and fourth article of war [prescribing non-judicial disciplinary punishments],

refer them for trial to a court-martial within his jurisdiction, or forward them to the next superior authority exercising court-martial jurisdiction over the command to which the accused belongs or pertains, * * * * ." (emphasis supplied)

In the premises, Article 22 prohibits a transfer of general court-martial jurisdiction from a commanding officer exercising such jurisdiction to his subordinate. Purported exercises of non-existent powers are nugatory. The general court-martial which tried, convicted and sentenced appellant was, therefore, without jurisdiction in that the convening authority lacked general court-martial jurisdiction over appellant.

In holding that the Uniform Code of Military Justice and the Manual for Courts-Martial do not negate the purported transfer of court-martial jurisdiction over appellant from the Commanding General, Eighth Army, to the Commanding General, I Corps, the lower court erred.

- b. In any event, the transfer of charges against appellant to I Corps was unlawful in that the Staff Judge Advocate, Eighth Army, presumed to effect the transfer.

Since it is clear that the Commanding General, Eighth Army, himself lacked power to transfer general court-martial jurisdiction over appellant to his subordinate I Corps, appellant submits that this Court need not reach this contention. Assuming, arguendo, however, that the Commanding General, Eighth Army, had the power to transmit charges against appellant to his subordinate, the Commanding General, I Corps, appellant contends that the power must be personally exercised by him.

That there was no such personal exercise here is plain. The Commanding General, Eighth Army, took no action in this case and had no contact with it. The Staff Judge Advocate, Eighth Army, on his own, purported to effect a transfer of general court-martial jurisdiction over appellant from the Commanding General, Eighth Army, to the Commanding General, I Corps.

Paragraph 35, M.C.M., 1951, treats the powers of an officer exercising general court-martial jurisdiction into whose hands charges may officially come. None of these powers may be delegated. Paragraph 35a, M.C.M. An integral segment of the power to convene is the requirement that, before a commander may refer a charge to a general court-martial for trial, he must determine that the charge alleges an offense under military law and is warranted by the available evidence. United States v. Roberts, 7 USCMA 322, 22 CMR 112 (1956). An accused is thus assured "that the convening authority himself will examine both the charge and the evidence against him, and will decide whether to refer the case for trial or not to do so, and, in the former instance, will determine the grade of court-martial * * * by which it shall be heard." United States v. Williams, 6 USCMA 243, 19 CMR 369, 371 (1955); see also United States v. Greenwalt, 6 USCMA 569, 20 CMR 285 (1953); United States v. Bunting, 4 USCMA 84, 15 CMR 84 (1954).

The Staff Judge Advocate may properly relieve his Commanding General of many administrative details. He may not assume, however, the power to refer cases for trial, the power of deciding whether the commanding officer normally exercising general court-martial jurisdiction is an accuser so that the charges must be forwarded to superior competent authority (Paragraph 5a(3), M.C.M., 1951), the power of appointment of personnel of a court-martial (Paragraph 6a, M.C.M., 1951), or any other powers of the commanding officer exercising general court-martial jurisdiction into whose hands charges may come (Paragraph 35a, M.C.M., 1951). Such powers are judicial, not administrative, and appertain to the Commanding General personally. See Runkle v. United States, 122 U.S. 543 (1887).

When the charges against appellant reached the Commanding General, Eighth Army, the situation presented was not unlike that which occurs upon the return of a summons or warrant upon an indictment or information in the United States district courts. The Staff Judge Advocate

could no more assume any supposed power of the Commanding General, Eighth Army, to transfer general court-martial jurisdiction over appellant, upward or downward, than a clerical employee in the district courts might transfer criminal proceedings against a defendant for prejudice. Assuming the power to transfer, the decision to do so was judicial and non-delegable to a staff officer.⁹

In the premises, the general court-martial which tried, convicted and sentenced appellant was without jurisdiction in that the convening authority of the said general court-martial lacked court-martial jurisdiction over appellant. Appellant's continued detention is, therefore, unlawful. The District Court erred when it dismissed appellant's amended petition for the writ of habeas corpus. The order of the District Court should be reversed and the cause remanded to the District Court with instructions to grant the writ and to discharge appellant from unlawful restraint.

II

THE COURT OF MILITARY APPEALS DEPRIVED APPELLANT OF CONSTITUTIONAL PROTECTIONS AND HE, THEREFORE, IS ENTITLED TO THE WRIT AND TO A DISCHARGE FROM CUSTODY.

Appellant contends that the United States Court of Military Appeals, in affirming his conviction and sentence, deprived him of due process of law and the equal protection of the laws in respect to the law officer's failure to instruct the court-martial as to the elements of the lesser included offense of unpremeditated murder, and that this deprivation entitles him to relief on habeas corpus.

⁹

Interestingly enough, there is no evidence of delegation. The situation appears to be one where the Staff Judge Advocate, Eighth Army, simply usurped the function of his Commanding General.

a. The denial of due process of law.

Both before and after its decision in appellant's case, the United States Court of Military Appeals repeatedly recognized the mandate of the Uniform Code of Military Justice and the Manual for Courts-Martial, 1951, that "it is the law officer who bears the primary burden of insuring that the fact finders are instructed as to the elements of those lesser included offenses which are reasonably raised by the evidence", and that failure of defense counsel to request such instructions, or object to their absence, does not serve as a waiver of rights in this regard. United States v. Wilson, 7 USCMA 713, 715, 23 CMR 177 (1957); see also United States v. Powell, 8 USCMA 381, 384, 24 CMR 191 (1957); United States v. Swain, 8 USCMA 387, 389, 24 CMR 197 (1957); United States v. Snyder, 6 USCMA 692, 21 CMR 14, 20 (1956); United States v. Morphis, 7 USCMA 748, 755, 23 CMR 212 (1957); United States v. Linder, 6 USCMA 669, 20 CMR 385, 390 (1956); United States v. Clark, 1 USCMA 201, 2 CMR 107 (1952). The law officer's failure properly to bear this burden voids a conviction obtained in such circumstances (Ibid.). That the law officer of the general court-martial which tried, convicted and sentenced appellant did not instruct such court-martial as to the elements of the lesser included offense of unpremeditated murder is plain.

The United States Court of Military Appeals, with one judge dissenting, affirmed appellant's conviction and sentence, notwithstanding fatal error in this respect. The Court concluded that "for all practical purposes", an instruction on the lesser included offense of unpremeditated murder had been given by the law officer. United States v. Day, 2 USCMA 416, 9 CMR 46, 53 (1953). In so doing, the majority of the Court of Military Appeals, as the late Judge Brosman made clear in dissent, extended before themselves a "brand-new carpet" on which "to march swiftly to the goal they seem so strongly bent on reaching". United States v. Day, 2 USCMA 416, 9 CMR 46, 59 (1953). Following

affirmance of appellant's conviction and sentence, the once-trod carpet was rolled up, not to be used thereafter.

The "protection of the individual against arbitrary action" has been characterized as the very essence of due process. Slochower v. Board of Education of New York, 350 U.S. 551, 559 (1956). The goal of a fair and more nearly equal application of criminal justice was ancient when, in 1215, the Magna Charta was signed. Our own constitutional guarantees of due process of law and equal protection of the laws allow no invidious discrimination, in criminal trials, between persons. Both guarantees emphasize the central aim of our entire judicial system -- all charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice. Griffin v. Illinois, 351 U.S. 12 (1956). And, while equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process, discrimination may be so unjustifiable as to violate the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). Due process under the Fifth Amendment serves as the basic protection of the citizen against unjust federal action, and is to be given an even broader connotation than Fourteenth Amendment due process. United States v. Townsend, 151 F.Supp. 378, 387 (D.C.D.C. 1957); cf. Sims v. Rives, 66 App. D.C. 24, 84 F.2d 871 (1936), cert. denied 298 U.S. 682 (1936).

If appellant was forced to stand before the bar of justice, in mandatory review proceedings on his conviction and sentence, on a basis of inequality by the United States Court of Military Appeals,¹⁰ he has been denied due process of law and equal protection of the laws in violation of the Fifth Amendment. See Hysler v. Florida, 315 U.S. 411 (1942). He submits that the facts in this respect are singularly clear.

¹⁰

That the action of the United States Court of Military Appeals is to be regarded as action of the Federal Government within the meaning of the Fifth Amendment is clear. See Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (Fourteenth Amendment, state courts).

b. The power and the duty of the court below to grant relief on habeas corpus.

The court below, after reciting appellant's contention concerning denial of constitutional protections, held that "no authority is cited in support of the power of this Court to grant relief by habeas corpus because a decision of an appellate court is inconsistent with other of its decisions". It is submitted that in so holding, the court below failed properly to apply the decisions of this Court and the Supreme Court in Burns v. Lovett, 91 U.S. App. D.C. 208, 202 F.2d 335 (1952), affirmed sub. nom. Burns v. Wilson, 346 U.S. 137 (1953).

Both this Court and the Supreme Court there noted the presence of "a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services". Burns v. Wilson, 346 U.S. 137, 141 (1953). This Court, after careful consideration of the basic problem of the scope of review by federal civilian courts on applications for habeas corpus by military prisoners, then phrased these propositions (Burns v. Lovett, 91 U.S. App. D.C. 208, 202 F. 2d 335, 342):

"(1) An accused before a court-martial is entitled to a fair trial within due process of law concepts.

"(2) The responsibility for insuring such fairness and for determining debatable points is upon the military authorities, and their determinations are not reviewable by the courts, except

"(3) That, in the exceptional case when a denial of a constitutional right is so flagrant as to affect the 'jurisdiction' (i.e., the basic power) of the tribunal to render judgment, the courts will review upon petition for habeas corpus. To support issuance of a writ of habeas corpus the circumstances shown by the papers before the court must so seriously affect the fundamental fairness of the trial and the validity of the appellate and later determinations as to deprive the military authorities of jurisdiction, i.e., of power to act."

In affirming, the Supreme Court may have differed with this Court in respect of this Court's reweighing of evidence. There was, however, concurrence with this Court's view that a manifest refusal by the military reviewing courts to consider claims of violation of rights, or a failure to give full and fair consideration to such claims, creates in the federal civilian courts the power to review on habeas corpus. Burns v. Wilson, 346 U.S. 137, 144-146 (1953). Affirmance was premised on the failure of "petitioners* * * to show that this military review was legally inadequate to resolve the claims which they have urged upon the civil courts". Appellant submits that he has not failed to make such a showing.

Plainly, this Court and the Supreme Court have held that each level in the military hierarchy must adhere to and apply standards of fundamental fairness, ferret out irregularities in trials by court-martial, and enforce both substantive and procedural safeguards guaranteed by the Constitution and Acts of Congress. A fortiori, these standards must be applied, and duties discharged, equally to every prisoner before the bar of military justice. The United States Court of Military Appeals, both prior to and after its action on appellant's conviction and sentence, has uniformly and strictly required the law officer to instruct, sua sponte if necessary, on lesser included offenses. In no instance save this has the Court relaxed its rule to hold that instruction on lesser included offenses need only be given "for all practical purposes." Manifestly, the standards imposed upon the military reviewing authorities have been applied neither equally nor properly in this case. Because of its failure so to apply these standards, the United States Court of Military Appeals lost jurisdiction, i. e., the power to act, and the federal civil courts have ample power on habeas corpus to make the constitutional guarantees of due process and equal protection of laws meaningful to appellant.

In the circumstances of this case, the District Court erred in holding that it was powerless to grant relief to appellant. The order of the District Court dismissing appellant's amended petition for the writ of habeas corpus should be reversed and the cause remanded to the District Court with instructions to grant the writ and to discharge appellant from unlawful restraint.

CONCLUSION

The Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951, properly interpreted, prohibit the attempted transfer of court-martial jurisdiction which occurred here. The convening authority of the general court-martial which tried, convicted and sentenced appellant lacked court-martial jurisdiction over appellant and, therefore, the said general court-martial was without jurisdiction. In any event, the circumstances shown by the review proceedings on appellant's conviction and sentence so seriously affect the validity of the affirmance of his conviction as to deprive the military authorities of the power to act. The District Court erred when it dismissed appellant's petition and amended petition for the writ. The order of the District Court should be reversed and the cause remanded to the District Court with direction to grant the writ and to discharge appellant from custody.

Respectfully submitted,

HARRY E. WOOD

712 Tower Building
Washington 5, D. C.

Attorney for Appellant

GUY EMERY

Of Counsel

APPENDIX A

Constitutional Provision, Statute, and Regulations
Involved

Amendment 5 of the Constitution of the United States provides in pertinent part that:

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

* * * * *

The Act of May 5, 1950, c. 169, 64 Stat. 115, Article 22, 50 U.S.C., Section 586, provides in pertinent part as follows:

(a) General courts-martial may be convened by * * *

(3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps * * *

* * * * *

(b) When any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him.

* * * * *

The Manual for Courts-Martial, United States, 1951, provides in pertinent part as follows:

5. CONVENING AUTHORITIES. -a. General courts-martial. -

(3) It is unlawful for an accuser to convene a general court-martial for the trial of the person so accused. When any commander who would normally convene the general court-martial is the accuser in a case, he shall refer the charges to a superior competent authority who will convene the court or designate another competent convening authority to exercise jurisdiction. A superior competent authority may convene the court to try any other case in a subordinate command if he so desires (Art. 22b). Thus, if the exigencies of the service interfere with the prompt disposition of cases, a superior competent to convene general

courts-martial properly may convene courts for the trial of cases arising in a subordinate command.

* * * * *

(5) As Article 22 expressly designates those who have authority to convene general courts-martial, it follows that no one else has this authority and that anyone having this authority cannot delegate or transfer it to another. The authority of a commanding officer to convene general courts-martial is independent of his rank and is retained by him as long as he continues to be such a commander. The rules as to the devolution of command in case of the death, disability, or temporary absence of a commander are stated in departmental regulations.

* * * * *

35. ACTION BY OFFICER EXERCISING GENERAL COURT-MARTIAL JURISDICTION. -a. General. - The charges received by the officer exercising general court-martial jurisdiction ordinarily will have been investigated under the provisions of 34 and Article 32, and will have been examined and forwarded with an appropriate recommendation by an officer exercising summary court-martial jurisdiction. The charges and allied papers usually will be in triplicate, with one additional copy for each accused in excess of one. With respect to the disposition of charges received by him, he is empowered, as the officer exercising general court-martial jurisdiction, to refer them for trial to a general court-martial convened by him, to authorize the trial of certain capital offenses by inferior courts-martial, or, in lieu of trial, to impose forfeitures of pay in appropriate cases upon officers and warrant officers of his command under the provisions of Article 15. In addition to these powers - none of which may be delegated - he may take any action on the charges which the immediate commander (32) or the officer exercising summary court-martial jurisdiction (33) is authorized to take. He may take this latter action himself or he may return the charges and allied papers to a proper subordinate commander with the instruction that appropriate action be taken by him.

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JOINT APPENDIX

[Filed August 10, 1954]

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN E. DAY, JR.,

Petitioner

v.

Habeas Corpus No. 71-54

CHARLES E. WILSON,
Secretary of DefenseROBERT T. STEVENS,
Secretary of the Army

and

MATTHEW B. RIDGWAY,
Chief of Staff, U. S. Army

PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court for the District of Columbia:

Now comes the petitioner, John E. Day, Jr., by his attorney, Burr Tracy Ansell, and respectfully represents to the Court as follows:

1. He is a citizen of the United States and an enlisted member of the United States Army. He is a resident of the District of Columbia.

2. He is unjustly and unlawfully detained and imprisoned under color of the authority of the United States in the custody of Headquarters, Japan Logistical Command, Japan. The said Command is under the authority of and responsible to the respondents, Charles E. Wilson, Robert T. Stevens, and Matthew B. Ridgway, all of whom are within the jurisdiction of this Court.

3. The purported cause of such detention is by virtue of a trial by general court-martial, and mandatory review proceedings

2

thereon, for murder in violation of the 92d Article of War, 10 U. S. C. 1564, and for assault with a deadly weapon with intent to do great bodily harm in violation of the 93d Article of War, 10 U. S. C.

1564, held at Headquarters, I Corps, APO 358, United States Army, in Korea, October 1, 1951, resulting in the petitioner's conviction and sentence of death. The court-martial proceedings were approved by the reviewing authority, one General O'Daniel, and the record forwarded to Washington, D. C., for review by a Board of Review in the office of the Judge Advocate General of the Army. On February 29, 1952, a Board of Review found the conviction and sentence correct in law and fact and affirmed them. Upon mandatory review by the United States Court of Military Appeals, the said Court, with one judge dissenting, on April 30, 1953, affirmed the holding of the Board of Review. On June 30, 1954, the conviction and sentence were confirmed and ordered executed by the President of the United States assuming to act under Article 71(a), Uniform Code of Military Justice, 50 U. S. C. 658(a).

4. The aforesaid actions resulting in the continuing restraint and imprisonment of the petitioner are illegal being in violation of the Uniform Code of Military Justice and the Constitution of the United States in that the approval of the conviction and sentence by the reviewing authority, the affirmance thereof by the Board of Review and the United States Court of Military Appeals, and the confirmance thereof by the President were had in violation of the petitioner's rights as a citizen of the United States and a member of the United States Army.

5. The reviewing authority, the Board of Review, the United States Court of Military Appeals, and the President were without
3 jurisdiction to act upon the conviction and sentence of the petitioner in that the petitioner was denied in all proceedings before such authorities counsel of his own choice in violation of Articles 27, 38, and 70, Uniform Code of Military Justice, 50 U. S. C. 591, 613, and 657, and the Fifth and Sixth Amendments to the Constitution of the United States.

6. At the trial before the general court-martial in Korea, October 1, 1951, petitioner was represented by Lieutenant Colonel Lysle I. Abbott and First Lieutenant Wayne G. Williams, both United States Army, the regularly appointed military defense counsel

and assistant military defense counsel, respectively. It was the duty of such defense counsel to represent the petitioner before the reviewing authority following his conviction and sentence by the general court-martial. Petitioner is advised and believes that neither the said Colonel Abbott nor the said Lieutenant Williams nor anyone else appeared on his behalf before the reviewing authority or otherwise made on his behalf any representations to the said reviewing authority.

7. After the reviewing authority had approved the petitioner's conviction and sentence and the proceedings were forwarded to Washington, D. C., for review, the petitioner notified the Department of the Army that civilian counsel of his own choice who would represent him before the reviewing authorities in Washington would be Burr Tracy Ansell who has executed the petition herein. Thereafter, the said Burr Tracy Ansell attempted to represent the petitioner before the Board of Review, the United States Court of Military Appeals, and the President of the United States. He was denied any opportunity to represent the petitioner before these authorities through the action of

4 the Department of the Army in refusing to permit any conference between the petitioner and his civilian counsel except by mail or electronic means. This refusal was accomplished through holding the petitioner in Japan and preventing his return to the United States for the purpose of conferring with counsel, and by denying the petitioner's counsel any assistance in transporting him to Japan for the purpose of such conference, although such facilities were fully available under the control of the Department of the Army and would have been used by counsel without substantial cost to the Army. The petitioner who is now 24 years of age has served as a private and corporal in the Army for the past seven years and has never had funds sufficient to defray the expense of having counsel travel by commercial means of transportation between the United States and Japan.

8. The Department of the Army at all times refused to permit civilian counsel for the petitioner to talk with or secure any information from one Walter L. Foster, an officer or employee of the Army

who was a principal prosecution witness at the trial before the general court-martial which tried, convicted, and sentenced the accused. Instead, it directed the said Foster to decline to communicate to petitioner's counsel any information concerning the events of the charged offenses for which the petitioner was tried, convicted, and sentenced. The said Foster was the first American to observe the scene of the charged offenses and the persons of the victims; he took the petitioner in custody shortly following the time of the commission of the charged offenses; and he took an incriminatory statement or confession from the accused the day following the commission of the charged offenses which was received in evidence against the accused at the trial.

5 9. The President was without jurisdiction to act in the said proceedings further in that he denied the petitioner a hearing before him in violation of Article 71, Uniform Code of Military Justice, 50 U.S.C. 658, and the Fifth Amendment to the Constitution of the United States.

10. The President was without jurisdiction to act in the said proceedings further in that, in confirming the conviction and sentence of the petitioner, he did not consider the entire record of the proceedings, he considered matters outside the record, and he received advice from his counsel and from the Pardon Attorney, Department of Justice, without notice to the petitioner.

11. The effect of the above-stated conditions was to make the petitioner's trial, conviction, sentence, and subsequent review proceedings a subterfuge for the denial of the petitioner's statutory and constitutional rights. He has thus been denied the benefit of the provisions of the Uniform Code of Military Justice imposing a duty upon the reviewing authority, the Board of Review, the United States Court of Military Appeals, and the President of the United States "to review the convictions of courts-martial, to ferret out irregularities in the trial and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services." By reason of

the denial of these fundamental rights, he is entitled to release from the custody of the respondents.

WHEREFORE, the petitioner prays:

1. That a writ of habeas corpus issue out of this Court directed to Charles E. Wilson, Secretary of Defense, Robert T. Stevens, Secretary of the Army, and Matthew B. Ridgway, Chief of Staff, United States Army, or some person or persons acting in their place and

6 stead, requiring them to produce the body of the petitioner, John E. Day, Jr., forthwith before this Court, together with the cause of his detention.

2. That in the alternative a rule to show cause why such writ should not issue directed to the said respondents be granted herein.

3. That a hearing be had before this Court to inquire into and determine the legality of said detention and that, pending such hearing, said respondents, and each of them, be required to stay execution of the sentence of death against the petitioner until final determination of this petition.

4. That, upon final hearing, the petitioner may be discharged from said custody.

5. For such other and further relief as to the Court may seem meet and proper.

/s/ Burr Tracy Ansell
Burr Tracy Ansell
712 Tower Building
Washington 5, D. C.
Attorney for Petitioner

DISTRICT OF COLUMBIA, ss:

BURR TRACY ANSELL, being first duly sworn, deposes and says that he is attorney for John E. Day, Jr., the petitioner herein, and that he files this petition and has executed the same on behalf of the aforesaid John E. Day, Jr., and at his request; that he has read the foregoing petition by him subscribed; and that the matters and

7 things therein set forth of his own personal knowledge are true and those alleged on information and belief he verily believes to be true.

/s/ Burr Tracy Ansell

* * * *

8 [Filed August 27, 1954]

* * * *

**RESPONDENTS MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS**

Come now the respondents, Charles E. Wilson, Secretary of Defense, Robert T. Stevens, Secretary of the Army, and General Matthew B. Ridgway, Chief of Staff, United States Army, by their attorneys, and move to dismiss the petition filed herein because the petition discloses that this Court is without jurisdiction to issue the writ and fails to state a basis upon which relief can be granted.

Attached hereto and incorporated as integral parts of this motion to dismiss are certain documents (marked Exhibits A through I) showing that the conviction and sentence of the petitioner are not jurisdictionally defective at any appellate or other stage of the court-martial proceedings had in his case.

The grounds upon which this motion is based are that:

1. By Act of Congress, this District Court does not have jurisdiction to consider an application for habeas corpus where, as here, the petition alleges that the petitioner is imprisoned in Japan which is outside the territorial confines of the District of Columbia.

9 2. Each and every contention of the petitioner is wholly without merit and support in law, to-wit:

a. The petition does not allege any requirement of law and there is no requirement of law that the regularly appointed military defense counsel or assistant defense counsel in a court-martial case resulting in the conviction of an accused appear before the "reviewing" (convening) authority or otherwise make representations to such convening authority in behalf of the accused. It is not contended

that the court-martial was without jurisdiction to try, convict and sentence the petitioner; and it appears that the court-martial had jurisdiction of the person and offense and had power to impose the sentence; that the action of the convening authority in approving the sentence was taken according to law after the record of trial had been reviewed by his staff judge advocate as required by law; and that the approved sentence is lawful (Exhibit A: Record of Trial and action of convening authority; Exhibit B: Review of the Staff Judge Advocate).

b. The petition does not allege any requirement of law and there is no requirement of law that the Government, at its own expense, transport a civilian appellate defense counsel from the United States to Japan or transport a convicted accused to the United States from the Far East Command where the offense was committed, the trial held and where his confinement was directed by the convening authority (Exhibit I: Department of the Army GCMO No. 68), for the purpose of a conference between such counsel and the accused, or otherwise. In the absence of any such allegations in the petition or requirements of law, and it fully appearing that at all stages of appellate review civilian and military appellate defense counsel could have had communication with the petitioner "by mail and electronic means", that the petitioner was ably represented at all stages of appellate review by civilian appellate defense counsel and by defense appellate counsel appointed by The Judge Advocate General at the request of the petitioner, there was no denial to the petitioner of counsel of his own choice, and the board of review and the United States Court of Military Appeals in deciding and adjudicating the case upon appeal therefore acted with the full jurisdiction conferred upon them by law (Exhibit A-1: Request for Appellate Counsel appointed by TJAG; Exhibit C: Appearance of Civilian Appellate Counsel; Exhibit D: Requests for Continuance, Assignments of Error before, and Decision of Board of Review; Exhibit E: Pleadings, briefs, motions for continuance before and decision of Court of Military Appeals; Exhibit F: Correspondence

of Civilian Appellate Counsel with Department of the Army and replies received by civilian appellate counsel from Army officers and personnel).

c. There is no requirement of law that the Government, at its own expense, transport either counsel or the accused for the purpose of a conference between counsel and the accused incident to action by the President of the United States on the court-martial sentence of the accused; nor is there any requirement of law for a "hearing" of a person convicted by court-martial or of his counsel before the President, or for a personal study of and consideration by the President of "the entire record of the proceedings". Nor, in approving the sentence, is the President prohibited by law from receiving advice from his counsel and the Pardon Attorney of the Department of Justice or from considering matters outside the record (including letters for or against clemency or recommendations for or against the approval of the sentence as contained in briefs or letters or oral or written advices submitted in behalf of or against the accused, or otherwise), with or without notice to the petitioner (Exhibit F, supra, and Exhibit G: Brief filed by Civilian Appellate Counsel for consideration of the President, (Exhibit H: letter of Secretary of the Army to and action of the President).

The petition does not allege or indicate what specific matters outside the record were considered by the President, or what specific portions of "the entire record" were not considered by him. It appears that, in approving the sentence, the President acted according to the law (Exhibit H, supra).

11 d. There is no requirement of law that a former prosecution witness, Walter L. Foster, must answer inquiries, written or oral, from an appellate defense counsel concerning such former witness' previous testimony or knowledge of the crime; nor does the petition allege that there was no communication in fact between such counsel and said Foster, or that the failure of said Foster to directly communicate with petitioner's civilian appellate defense counsel was

contrary to law, or that it in any way deprived any appellate review body of jurisdiction to decide and adjudge the case before it, or that a writ of habeas corpus should be granted because of the failure of said Foster to directly communicate with such defense counsel. In point of fact, civilian appellate defense counsel first sought to communicate with the said Foster in the interim between the initial decision of the Court of Military Appeals and the denial by that Court of Petition for Rehearing (Exhibits E and G, *supra*).

3. The petitioner does not allege or show that the appellate review was inadequate to resolve the claims now urged in his petition or that he was denied an opportunity to raise these issues before the Board of Review or the United States Court of Military Appeals. Instead, the petition indicates that all such matters, save and except those alleged in paragraphs 9 and 10 of the petition, were available for resolution both by the Board of Review and the United States Court of Military Appeals had civilian appellate counsel chosen to so present them thereto. It does not appear that the failure or refusal of civilian appellate defense counsel to submit these matters to the Board of Review or to the United States Court of Military Appeals deprived those appellate bodies of jurisdiction over the case. In fact it appears that the events giving rise to the foregoing issues occurred long after the Board of Review had rendered its decision in the case, and that such issues were indirectly raised before the Court of Military Appeals (Exhibits D and E, *supra*).

- 12 4. Except for the allegations in paragraphs 9 and 10 of the petition, all of the foregoing issues were raised by petitioner in his brief to the President who approved and ordered the sentence into execution (Exhibits G and H, *supra*). The allegations in said paragraphs 9 and 10 have been considered in paragraph 2c, *supra*.

WHEREFORE, the respondents respectfully pray that the order to show cause be discharged; that the petition be dismissed; that the stay of execution heretofore ordered by this Court be vacated; and

LEO A. ROVER

United States Attorney

ALEXANDER L. STEVAS

Assistant United States Attorney

/s/ A. G. Eger

LT. COL. A. G. EGER

Judge Advocate General's Corps

United States Army

Attorneys for the Respondents

15 [Filed May 16, 1957]

JOHN E. DAY, JR., Petitioner,

V.

**CHARLES E. WILSON, Secretary
of Defense.**

**WILBER M. BRUCKER, Secretary
of the Army,**

and

**MAXWELL D. TAYLOR, Chief of Staff,
United States
Army,**

Respondents.

Habeas Corpus No. 71-54

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court for the District of Columbia:

Now comes the petitioner, John E. Day, Jr., by his attorneys Harry E. Wood and Guy Emery, and respectfully represents to the Court as follows:

1. He is a citizen of the United States and an enlisted member of the United States Army. He is a resident of the District of Columbia.

2. At the time of the filing of his petition for writ of habeas corpus herein August 10, 1954, he was unjustly and unlawfully detained

and imprisoned under color of the authority of the United States in the custody of Headquarters, Japan Logistical Command, Japan, which command was under the authority of and responsible to the then respondents Charles E. Wilson, Robert T. Stevens, and Matthew B. Ridgway, all of whom were within the jurisdiction of this Court. Petitioner is now unjustly and unlawfully detained and imprisoned under color of the authority of the United States in the custody of the Com-

16 mandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas. The said Commandant is under the authority of and responsible to the present respondents Charles E. Wilson, Wilber M. Brucker and Maxwell D. Taylor, all of whom are within the jurisdiction of this court, the said Wilber M. Brucker and Maxwell D. Taylor having duly been substituted herein in the place and stead of the said Robert T. Stevens and Matthew B. Ridgway, respectively, by order of the United States Court of Appeals for the District of Columbia Circuit.

3. The purported cause of such detention is by virtue of a trial by general court-martial, and mandatory review proceedings thereon, for murder in violation of the 92d Article of War, 10 U. S. C. 1564, and for assault with a deadly weapon with intent to do great bodily harm in violation of the 93d Article of War, 10 U. S. C. 1565, held at Headquarters, I Corps, APO 358, United States Army, in Korea, October 1, 1951, resulting in the petitioner's conviction and sentence of death. The court-martial proceedings were approved by the convening authority, Major General John W. O'Daniel, and the record forwarded to Washington, D. C., for review by a Board of Review in the office of the Judge Advocate General of the Army. On February 29, 1952, a Board of Review found the conviction and sentence correct in law and fact and affirmed them. Upon mandatory review by the United States Court of Military Appeals, the said court, with one judge dissenting, on April 30, 1953, affirmed the holding of the Board of Review. On June 30, 1954, the conviction and sentence were confirmed and ordered executed by the President of the United States assuming to act under Article 71(a), Uniform Code of Military Justice, 50 U.S.C.

658(a).

17 4. The aforesaid actions resulting in the continuing restraint and imprisonment of the petitioner are illegal being in violation of the Uniform Code of Military Justice and the Constitution of the United States in that the general court-martial which tried, convicted and sentenced the petitioner was without jurisdiction over the petitioner.

5. The petitioner was a member of the 69th Transportation Truck Battalion and, as such, was under the jurisdiction of the Commanding General, Eighth Army for purposes of court-martial jurisdiction. The convening authority of the general court-martial which tried, convicted and sentenced the petitioner was the Commanding General, I Corps, a subordinate of the Commanding General, Eighth Army. The initial charges preferred against the petitioner were forwarded to the Commanding General, Eighth Army, on or about June 24, 1951. On June 27, 1951, Colonel Chester D. Silvers, Staff Judge Advocate of Eighth Army, without any participation therein or knowledge thereof on the part of the Commanding General, Eighth Army, and without consulting the said Commanding General, unlawfully purported to effect a transfer of court-martial jurisdiction from the Commanding General, Eighth Army, to the Commanding General, I Corps, by preparing and causing to be sent an indorsement requesting, "in view of the circumstances," that I Corps "exercise disciplinary jurisdiction" over the petitioner.

6. The general court-martial which tried, convicted and sentenced the petitioner was without jurisdiction in that the convening authority lacked court-martial jurisdiction over the petitioner for the reasons (a) that the Commanding General, Eighth Army, having court-martial jurisdiction over the petitioner had no power to transfer such jurisdiction to his subordinate commanding I Corps; (b) that the Commanding General, Eighth Army, had no power to transfer such court-martial jurisdiction to his said subordinate without reason therefor appearing in the record; and (c) that the Commanding General, Eighth Army, did not transfer such court-martial jurisdiction to his

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said subordinate, but that Colonel Chester D. Silvers, Staff Judge Advocate of the Eighth Army, without consultation with the Commanding General, Eighth Army, and without any participation therein or knowledge thereof on the part of the Commanding General Eighth Army, unlawfully purported to do so.

7. The aforesaid actions resulting in the continuing restraint and imprisonment of the petitioner are illegal being in violation of the Uniform Code of Military Justice and the Constitution of the United States in that the approval of the conviction and sentence by the convening authority, the affirmance thereof by the Board of Review and the United States Court of Military Appeals, and the confirmance thereof by the President were had in violation of the petitioner's rights as a citizen of the United States and a member of the United States Army.

8. The convening authority, the Board of Review, the United States Court of Military Appeals, and the President were without jurisdiction to act upon the conviction and sentence of the petitioner in that the petitioner was denied in all proceedings before such authorities counsel of his own choice in violation of Articles 27, 38, and 70, Uniform Code of Military Justice, 50 U. S. C. 591, 613, and 657, and the Fifth and Sixth Amendments to the Constitution of the United States.

9. At the trial before the general court-martial in Korea, October 1, 1951, petitioner was represented by Lieutenant Colonel Lysle I. Abbott and First Lieutenant Wayne G. Williams, both United States Army, the regularly appointed military defense counsel and assistant military defense counsel, respectively. It was the duty of such defense counsel to represent the petitioner before the convening

19 authority following his conviction and sentence by the general court-martial. Petitioner is advised and believes that neither the said Colonel Abbott nor the said Lieutenant Williams nor anyone else appeared on his behalf before the convening authority or otherwise made on his behalf any representations to the said convening authority.

10. After the convening authority had approved the petitioner's

conviction and sentence and the proceedings were forwarded to Washington, D. C., for review, the petitioner notified the Department of the Army that civilian counsel of his own choice who would represent him before the reviewing authorities in Washington would be Burr Tracy Ansell who executed the petition filed herein August 10, 1954. Thereafter, the said Burr Tracy Ansell attempted to represent the petitioner before the Board of Review, the United States Court of Military Appeals, and the President of the United States. He was denied any opportunity to represent the petitioner before these authorities through the action of the Department of the Army in refusing to permit any conference between the petitioner and his civilian counsel except by mail or electronic means. This refusal was accomplished through holding the petitioner in Japan and preventing his return to the United States for the purpose of conferring with counsel, and by denying the petitioner's counsel any assistance in transporting him to Japan for the purpose of such conference, although such facilities were fully available under the control of the Department of the Army and would have been used by counsel without substantial cost to the Army. This refusal persisted throughout all proceedings on behalf of the petitioner before these authorities. The petitioner who is now 27 years of age has served as a private and corporal in the Army for the past ten years

20 and never had funds sufficient to defray the expense of having counsel travel by commercial means of transportation between the United States and Japan.

11. The Department of the Army at all times refused to permit civilian counsel for the petitioner to talk with or secure any information from one Walter L. Foster, an officer or employee of the Army who was a principal prosecution witness at the trial before the general court-martial which tried, convicted, and sentenced the accused. Instead, it directed the said Foster to decline to communicate to petitioner's counsel any information concerning the events of the charged offenses for which the petitioner was tried, convicted, and sentenced.

The said Foster was the first American to observe the scene of the charged offenses and the persons of the victims; he took the petitioner in custody shortly following the time of the commission of the charged offenses; and he took an incriminatory statement or confession from the accused the day following the commission of the charged offenses which was received in evidence against the accused at the trial.

12. The United States Court of Military Appeals was without jurisdiction to act upon the conviction and sentence of the petitioner in that the said Court of Military Appeals denied to the petitioner due process of law and equal protection of the laws in violation of the Fifth Amendment to the Constitution of the United States by failing, in affirming the petitioner's conviction and sentence, to apply the mandate of the Uniform Code of Military Justice and the Manual for Courts-Martial, repeatedly recognized by the said Court of Military Appeals prior to its affirmance of the petitioner's conviction and sentence and repeatedly recognized by the said Court of Military Appeals subsequent
21 to its affirmance of the petitioner's conviction and sentence, that the law officer of a court-martial must instruct such court-martial not only on the elements of the offense charged but also as to the elements of lesser included offenses fairly raised by the evidence as reasonable alternatives to the offense charged.

13. At the trial of the petitioner before the general court-martial in Korea, October 1, 1951, the evidence introduced respecting the charge of premeditated murder in violation of the 92d Article of War fairly raised the lesser included offense of unpremeditated murder as a reasonable alternative to the offense charged. The law officer of the said court-martial did not instruct such court-martial respecting the elements of the lesser included offense of unpremeditated murder. Under the Uniform Code of Military Justice and the Manual for Courts-Martial, as repeatedly recognized by the United States Court of Military Appeals, the law officer's failure to do so constituted clear prejudicial error.

14. The President was without jurisdiction to act in the said proceedings further in that he denied the petitioner a hearing before him in violation of Article 71, Uniform Code of Military Justice, 50 U. S. C. 658, and the Fifth Amendment to the Constitution of the United States.

15. The President was without jurisdiction to act in the said proceedings further in that, in confirming the conviction and sentence of the petitioner, he did not consider the entire record of the proceedings, he considered matters outside the record, and he received advice from his counsel and from the Pardon Attorney, Department of Justice, without notice to the petitioner.

22 16. The effect of the above-stated conditions was to make the petitioner's trial, conviction, sentence, and subsequent review proceedings null and void and a subterfuge for the denial of the petitioner's statutory and constitutional rights. He has thus been and now is detained and imprisoned unlawfully and unjustly, and he has thus been denied the benefit of the provisions of the Uniform Code of Military Justice imposing a duty upon the convening authority, the Board of Review, the United States Court of Military Appeals, and the President of the United States "to review the convictions of courts-martial, to ferret out irregularities in the trial and to enforce the procedural safeguards which Congress determined to guarantee to those in the Nation's armed services." By reason of the unlawfulness of his detention and imprisonment and by reason of the denial of these fundamental rights, he is entitled to release from the custody of the respondents.

WHEREFORE, the petitioner prays:

1. That a writ of habeas corpus issue out of this Court directed to Charles E. Wilson, Secretary of Defense, Wilber M. Brucker, Secretary of the Army, and Maxwell D. Taylor, Chief of Staff, United States Army, or some person or persons acting in their place and stead, requiring them to produce the body of the petitioner, John E.

Day, Jr., forthwith before this Court, together with the cause of his detention.

2. That in the alternative a rule to show cause why such writ should not issue directed to the said respondents be granted herein.

3. That a hearing be had before this Court to inquire into and determine the legality of said detention and that, pending such hearing, said respondents, and each of them, be required to stay execution of

23 the sentence of death against the petitioner until final determination of this petition.

4. That, upon final hearing, the petitioner may be discharged from said custody.

5. For such other and further relief as to the Court may seem meet and proper.

/s/ Harry E. Wood
Harry E. Wood

/s/ Guy Emery
Guy Emery
712 Tower Building
Washington 5, D. C.
Attorneys for Petitioner

* * * *

25 [Filed May 16, 1957]

* * * *

ORDER GRANTING PETITIONER'S MOTION FOR LEAVE TO FILE AMENDED PETITION

This cause having come on for consideration upon the petitioner's motion for leave to file amended petition for writ of habeas corpus, and it appearing to the court that justice requires that leave to amend be given, and the court having been fully advised, it is by the court this 16th day of May, 1957,

ORDERED that petitioner be and he is hereby granted leave to file his amended petition for writ of habeas corpus.

/s/ Henry A. Schweinhaut
Judge

26 [Filed May 16, 1957]

* * * * *

RULE TO SHOW CAUSE

Upon consideration of the amended petition of John E. Day, Jr., for a writ of habeas corpus filed herein, and good cause appearing therefor, it is by the Court, this 16th day of May, 1957,

ADJUDGED and ORDERED, That Charles E. Wilson, Secretary of Defense, Wilber M. Brucker, Secretary of the Army, and Maxwell D. Taylor, Chief of Staff, U. S. Army, be and they are hereby ordered and directed to appear before the Judge of said Court sitting in Motions Court on the 12th day of June, 1957, at 10:00 o'clock a. m. of said day, to show cause, if any they have, why a writ of habeas corpus should not be issued and the relief granted as prayed for in the aforesaid petition; provided that a copy of this rule and of said petition be served upon the respondents herein.

27 It is further ordered that the said Charles E. Wilson, Secretary of Defense, Wilber M. Brucker, Secretary of the Army, and Maxwell D. Taylor, Chief of Staff, U. S. Army, or whoever, acting under their orders or the orders of any of them, shall have the custody or keeping of said John E. Day, Jr., is hereby directed to stay execution of the sentence of death against the petitioner until the further order of the Court herein.

/s/ Henry A. Schweinhaut
Judge

28 [Filed June 12, 1957]

* * * * *

RETURN AND ANSWER TO AMENDED PETITION FOR A WRIT OF HABEAS CORPUS AND ORDER TO SHOW CAUSE ISSUED THEREON

Come now the respondents, by the United States Attorney in and

for the District of Columbia, and, as a return and answer to the order to show cause why a writ of habeas corpus should not issue, represent unto the Court the following:

1. Petitioner John E. Day, Jr., is in the custody of Colonel James W. Davis, Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas, under a Court-Martial sentence of death. Colonel Davis is a subordinate of, and under the command of, the respondents herein.

2. The facts disclosed in the records of the court-martial proceedings (Exhibit "A") are these:

Petitioner was a soldier in the United States Army and stationed in Korea. On the night of December 22-23, 1951, at which time Seoul was being evacuated by the United Nations Forces because of the Chinese Communist Forces offensive, Lee Hak Chun, his wife, Kim Chung Hi, and their three children were in a basement room of the "VIP billets" in the Eighth Army Officers' Building in Seoul awaiting transportation to Taegu. Several other Koreans were in an adjoining room. About midnight, Day came into the room where Lee and his
29 family were waiting, sat down beside Kim and put out the lights. Day then turned on the lights and seized Kim by her throat. Someone intervened and succeeded in taking Kim from Day, whereupon Day struck Lee in his mouth. Day left the room, only to return in a short time with an interpreter. Day was clad only in shorts and an undershirt and was carrying a carbine. The interpreter stated that Day wanted Kim "conceded" to him, and that if Lee did not send her upstairs, he (Day) would kill all of them. Day had all of the persons in the basement line up and had the interpreter direct Lee to step out of line. When Lee did as directed, Day fired two shots from the carbine into Lee's body in the vicinity of the Korean's heart, then seized Kim by the neck and chest and took her outside. When she screamed while he was making indecent advances toward her, Day struck her in the head with the carbine five times, took her baby from her back (where

Korean women traditionally carry their babies) and threw it on the front seat of a truck. At about one o'clock that morning, CID Agent Walter Foster went to the aforementioned building where he found Lee lying on the floor on his back. The agent, who had four years' experience as an undertaker, examined the body of Lee, found no pulse, respiration, or body heat, and determined that Lee was dead. Two days later a Korean policeman also determined that Lee was dead and directed that he be buried. Because of the strategic withdrawal to the Pusan perimeter that was taking place, it was not possible to prepare charges against Day until May 13, 1951, when the United Nations Forces were again on the offensive. On that date, charges were filed and Day was advised of them. The charges were referred for pre-trial investigation, but because of the difficulty in locating witnesses, it was not possible to complete the investigation until early August, 1951. On August 13, 1951, the original charges were withdrawn because of certain deficiencies, one of which being that the facts did not warrant the charge alleging the murder of the baby. New charges were prepared on August 23, 1951, investigated on August 31, 1951, and referred for trial on September 22, 1951. On that date, Day was placed in confinement. Day had signed a written confession on December 24, 1950.

30 Trial commenced October 1, 1951, after Day had frequent consultations with counsel. Day pleaded not guilty to all charges and specifications, but after trial (which record indicates that all available defenses were fully presented and urged) Day was found guilty of the offenses of premeditated murder and assault with a dangerous weapon. He was sentenced to death. It may be noted that Day was found not guilty of Charge III, indecent assault upon Kim.

3. The record of the court-martial (Exhibit B) was reviewed by the Staff Judge Advocate, I Corps, who found no errors which materially affected the rights of Day, and found the sentence legally correct. He recommended that the sentence of death be approved.

4. The matter was referred by the Commanding General, I Corps, to The Judge Advocate General of the Army for review by a Board of Review (Exhibit "A", p. 146). In addition to appellate defense counsel appointed by the Judge Advocate General at the request of Day (Exhibit "A"-1), Burr Tracy Ansell, Esq., entered appearance for the petitioner (Exhibit "C"). On February 29, 1952, the Board of Review affirmed the conviction and sentence (Exhibit "D"), having "found the findings of guilty and the sentence as approved by proper authority correct in law and fact, and having determined, on the basis of the entire record, that they should be approved . . ."

5. The proceedings were certified to the United States Court of Military Appeals for review, argument being heard on December 9, 1952 (Day being represented by counsel of his own choice), and on April 30, 1953, that Court affirmed the conviction. See United States v. Day, U.S.C.M.A. 416, 9 C.M.R. 46 (1953), a copy of the slip opinion being contained in Exhibit "E". On July 22, 1953, petition for rehearing was denied, 10 C.M.R. 960.

6. A brief on behalf of Day was sent by Mr. Ansell to the President of the United States on August 17, 1953 (Exhibit "G"). On June 30, 1954, President Eisenhower approved the sentence given Day and ordered that it be carried into execution under orders of the Secretary of the Army (Exhibit "H").

7. On July 7, 1954, General Court-Martial Order No. 68, Department of the Army ordered the sentence carried into execution (Exhibit "I").

31 8. Thereafter, while still confined by the Army in Japan, Day filed a petition for a writ of habeas corpus in this Court, H.C. 71-54, the instant case number. The original petition filed herein was based on an allegation that "the restraint and imprisonment of the petitioner are illegal being in violation of the Uniform Code of Military Justice and the Constitution of the United States in that the approval of the conviction and sentence by the reviewing authority, the affirmance

thereof by the Board of Review and the United States Court of Military Appeals, and the confirmance thereof by the President were had in violation of the petitioner's rights as a citizen of the United States and a member of the United States Army." This allegation is based mainly on contentions of ineffective assistance of counsel during the complete military review of the conviction. The Government filed a motion to dismiss the petition, and attached thereto, and incorporated therein, was a series of exhibits (A through I) indicating the legality of the military proceedings, and the fact that they were not jurisdictionally defective. It appeared that petitioner received effective assistance of counsel at his court-martial, and he has not yet contended to the contrary. The District Court granted the motion to dismiss on jurisdictional grounds, but struck from the order submitted the words "it further appearing that the petition fails to state a basis upon which relief can be granted." An appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. However, this appeal was held in abeyance after the filing of petitioner's brief because of proceedings filed by petitioner in the United States District Court for the District of Kansas.

9. The petitioner was returned from Japan to Fort Leavenworth, Kansas, while the appeal here was pending, and petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas (Day v. Davis, No. H.C. 2174). The first eleven paragraphs in the petition filed in Kansas were virtually identical to the petition filed here (with the exception being a change in the age of petitioner) and paragraphs twelve to sixteen in the Kansas petition enlarged the allegations of error to include contentions that petitioner was denied his right to have compulsory attendance of witnesses, that his signed confession was elicited from him illegally, that evidence was admitted illegally, that he had insufficient time to consult

32 with counsel before trial, and that the law officer failed to adequately instruct the court on a lesser included offense. After hearing

at which Day testified, and counsel for both sides "with commendable thoroughness and logic . . . presented their theories and arguments" in the matter, on November 18, 1955, the Court sustained a motion to dismiss the petition.

10. An appeal was then taken to the United States Court of Appeals for the Tenth Circuit. That Court considered each and every allegation of denial of petitioner's rights and affirmed the action of the District Court. Day v. Davis, 235 F.2d 374 (10 Cir. 1956). The Supreme Court of the United States denied a writ of certiorari (352 U.S. 881) and denied rehearing (352 U.S. 913).

11. Thereafter, the appellate proceedings in this Circuit were revived. On April 25, 1957, the United States Court of Appeals for the District of Columbia Circuit remanded this matter to this Court.

12. Petitioner thereupon filed an amended petition for a writ of habeas corpus, alleging substantially the same contentions as argued in Kansas and previously before this Court, but enlarging the petition with one completely new allegation. Petitioner argued before the Court of Appeals here, and has now incorporated into his present petition, that the jurisdiction of the General Court-Martial which convicted him was improperly transferred from the Eighth Army to I Corps.

13. All allegations of the petitioner pertaining to the illegality of his conviction, sentence, and present confinement, not specifically admitted herein, are denied.

ARGUMENT

I

This Court lacks the necessary jurisdiction to entertain the petition and amended petition for a writ of habeas corpus because the petitioner is not now, and was not at the time he filed his petition and amended petition for a writ of habeas corpus, within the territorial limits of the District of Columbia and the United States District Court for the District of Columbia. Cf. 28 U.S.C. §2241; Ahrens v. Clark, 335 U.S. 188 (1948); McAffee v. Clemmer, 84 U.S. App. D.C. 57, 171

33 F.2d 131 (1948); Goldberg v. Hoffman, 225 F.2d 463 (8 Cir. 1955); et al. It has been held by the United States Court of Appeals for the District of Columbia Circuit that this Court has the requisite jurisdiction to entertain a petition for a writ of habeas corpus filed by or on behalf of a person held by one of the Armed Forces of the United States beyond the territorial limits of the United States. Cozart v. Wilson, 98 U.S. App. D.C. 437, 236 F.2d 732(1956), ordered dismissed as moot, per curiam, Cozart v. Wilson, 352 U.S. 884, 1 L. Ed. 2d 82 (1956); Eisentrager v. Forrestal, 84 U.S. App. D.C. 396, 174 F.2d 961 (1949), reversed on other grounds, Johnson v. Eisentrager, 339 U.S. 763 (1950). However, the issue has never been squarely before the Supreme Court of the United States for decision. A possible indication of its position may be found in Georgia v. Pennsylvania R. Co., 324 U.S. 439, 467 (1945) wherein the Court stated that "apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial."

II

Assuming, arguendo, that this Court does possess the necessary jurisdiction to entertain the petition for a writ of habeas corpus, the petitioner is entitled to no relief.

First of all, it is conceded that the civil courts of the United States have jurisdiction to inquire into the jurisdiction of a court-martial, and to determine whether or not a petitioner's Constitutional rights have been denied him by such body. Hiatt v. Brown, 339 U.S. 103 (1950); Day v. Wilson, ____ U.S. App. D.C. ____ (No. 12,476, decided April 25, 1957). However, if the court cannot say that the military tribunals have failed to deal fully and fairly with the petitioner's contentions, the court's limited functions are exhausted. Bourchier v. Van Metre, 96 U.S. App. D.C. 181, 223 F.2d 696 (1955). Cf. Burns v. Wilson, 346 U.S. 137 (1953); Day v. Davis, Supra.

Petitioner has had his day in court. Not only has he had a complete review of his case through the military system, but he has had a

hearing on each of his allegations (but one) now pending by a Federal District Court wherein he is confined, and even testified at such hearing. When the relief he sought was denied by the Federal District Court in Kansas, he took an appeal therefrom. The United States Court of Appeals for the Tenth Circuit decided each and every one of petitioner's contentions in a lengthy and complete opinion (see 34 Day v. Davis, supra) and the Supreme Court of the United States declined review of that decision.

It is well established that although the doctrine of res judicata does not apply to habeas corpus proceedings,^{1/} the fact that the same issues before a court have been determined in a former proceeding may be given controlling weight. Dorsey v. Gill, 80 U.S. App. D.C. 9, 148 F.2d 859 (1945), cert. denied, 325 U.S. 890 (1945); Jordon v. Clemmer, 80 F. Supp. 539 (D.C. 1947); Swihart v. Johnson, 150 F.2d 721 (9 Cir. 1945), cert. denied, 327 U.S. 789; Guttermann v. Hiatt, 65 F. Supp. 285 (M.D. Pa. 1946). A court has a right to protect itself from a pertinacious relator, United States ex rel. Gregoire v. Watkins, 164 F.2d 137 (2 Cir. 1947). As Judge Alexander Holtzoff (sitting by designation) stated in the case of United States ex rel. Skaikas v. Shaughnessy et al., 115 F. Supp. 165 (S.D.N.Y. 1953): "While an adverse decision in a habeas corpus proceeding does not constitute res judicata, nevertheless, in the absence of some exceptional showing,

^{1/} Cf. Report of Judicial Conference, September Session, 1943, p. 22, wherein the habeas corpus committee, headed by Judge Parker, recommended legislation to apply the doctrine of res judicata to habeas corpus proceedings. See also, Use and Abuse of the Writ of Habeas Corpus, by Federal District Judge Louis E. Goodman, 7 F.R.D. 313 (1947).

It should also be noted that the doctrine of res judicata has been applied to the statutory substitute for habeas corpus (28 U.S.C. §2255). Public policy requires that there should be an end to litigation and litigants are entitled to protection from harassment by attempts to relitigate questions already finally determined. Lipscomb v. United States, 226 F.2d 812 (8 Cir. 1955).

repeated applications based on substantially the same facts, are not to be favored."

It should also be noted that the United States Court of Appeals for the District of Columbia Circuit stated in Day v. Wilson, supra, that this District Court should give great weight to the Kansas proceedings.

III

Petitioner raises one matter not alleged in any of his previous petitions for a writ of habeas corpus, but he did argue it before the Court of Appeals in this Circuit. He alleges that the general Court-martial which convicted and sentenced him was without the necessary jurisdiction. He bases his contention on (1) the Commanding General, 35 Eighth Army, had no power to transfer court-martial jurisdiction to his subordinate, Commanding General, I Corps; (2) that the reason for the transfer of jurisdiction to I Corps had to appear on the record; (3) and that the Commanding General, Eighth Army, did not himself transfer court-martial jurisdiction, but without his knowledge the transfer was ordered by the Staff Judge Advocate, Eighth Army.

In the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges. Wade v. Hunter, 336 U.S. 684, 692 (1949). From the decision in the Wade case, there can be no doubt that a Commanding General may transfer Court-martial jurisdiction in appropriate circumstances.

The reason for the transfer of court-martial jurisdiction in the instant case is patent from the record. The offense occurred in Seoul, Korea. The situation at the time the murder was committed was most fluid. In Appendix "A" to petitioner's reply brief filed in this Circuit Court of Appeals, the Staff Judge Advocate of the Eighth Army certified that the withdrawal from Seoul was completed on January 4, 1951, and United Nations Forces did not reenter the city until mid-March, 1951. After the recapture of Seoul, I Corps Headquarters was located

there, while Eighth Army Headquarters was located at Taegu, about one hundred and seventy-five (175) miles from Seoul. It is further stated in the affidavit that:

"It was considered desirable to have I Corps exercise disciplinary jurisdiction in this case as I Corps Headquarters was located near Seoul, and Seoul was the situs of the offenses and the location of several key witnesses. It was believed that if the case reached the court-martial stage, the proceedings would be facilitated by trial in the Seoul area. This was the only reason for the request that the Commanding General of I Corps exercise disciplinary jurisdiction."

It is apparent from a reading of the contents of Exhibit "A" that much consideration was given the pre-trial investigation, and that the pre-trial investigation was properly conducted as set forth in Art. 32, Uniform Code of Military Justice.

There is no contention made that the Commanding General of I Corps could not convene a general court-martial. See Art. 22a(3), Uniform Code of Military Justice.

36 The only question remaining, therefore, is whether or not the Staff Judge Advocate had the necessary authority to act for the Commanding General of the Eighth Army in transfer proceedings involving this case. Certain facts stand out. The Staff Judge Advocate is a member of the Special Staff of the Commanding General as provided by Army Regulation. As a member of the Special Staff, he was naturally expected to relieve the Commanding General of just such details as transfer of Court-martial jurisdiction. The use of the command line is not new. For instance, when a person is drafted into the service, the letter notifying the selectee states that the letter is from the President of the United States, and that John Doe is ordered into the active service of his country. However, the letter is signed by a member of the local draft board. It is not probable that the President has personal knowledge of the action. In a similar vein,

thousands of replacements sent to Korea were transferred from unit to unit by personnel officers under the command line of a commanding general. It is not likely that the General knew of the transfer of each of these many thousands of replacements. The duty of the Commanding General, Eighth Army was to repel the Communist Forces. He needed every minute of his day and night to personally direct the tactical and strategic operations of his Army. He had a staff to take care of administrative matters such as the transfer of court-martial jurisdiction. Although he was responsible for all of many ministerial acts performed by his staff, he could not be expected to review each and every action, or decision made by the staff. The very existence of a staff is to relieve the commander of such details. The affidavit of the staff judge advocate states that this transfer was made by him pursuant to a "standing operating procedure within the Eighth Army, designed to facilitate the orderly and expeditious administration of military justice."

There is no error in such a procedure.

IV

In view of the entire record of trial and military review thereof, even if this Court were to consider the entire proceedings de novo, without considering the proceedings in the Tenth Circuit, it is clear that the petitioner has stated no ground upon which relief can be granted.

37

CONCLUSION

Wherefore, the above premises considered, it is respectfully submitted that the petition, and amended petition for a writ of habeas corpus be denied, and that the rule to show cause be discharged.

/s/ Oliver Gasch

OLIVER GASCH

United States Attorney

By:

/s/ Alfred Burka

ALFRED BURKA

Assistant United States Attorney

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Pet. Ex. 1

SS:

4. The military situation during the period pertinent to the instant case was generally as follows: The Chinese Communists entered the war in the fall of 1950. On 23 December 1950 the United Nations forces were withdrawing from Seoul. The withdrawal from Seoul was completed on 4 January 1951. Our forces did not reenter Seoul until mid-March 1951.

5. After the recapture of Seoul, I Corps Headquarters was
39 located in the vicinity of that city, and Eighth Army Headquarters was located in Taegu; Taegu is about 175 miles southeast of Seoul.

6. The accused in the instant case was a member of the 69th Transportation Truck Battalion. That unit was placed under I Corps for operational control, and had its headquarters in the I Corps area of responsibility. The initial charges were forwarded to Headquarters, Eighth Army, because basically the battalion was an Army unit.

7. On 27 June 1951 I prepared and caused to be sent to the Commanding General, I Corps, an indorsement, bearing the Command line of Lieutenant General Van Fleet, stating the following, in reference to the instant case:

"In view of the circumstances, it is requested that your headquarters exercise disciplinary jurisdiction in subject case."

The symbol "KJA" in the heading of this indorsement was the office symbol for letters sent from my office. The initials "CDS" in the upper right corner of this indorsement are mine.

8. It was considered desirable to have I Corps exercise disciplinary jurisdiction in this case as I Corps Headquarters was located near Seoul, and Seoul was the situs of the offenses and the location of several key witnesses. It was believed that if the case reached the court-martial stage, the proceedings would be facilitated by trial in the Seoul area. This was the only reason for the request that the Commanding General of I Corps exercise disciplinary jurisdiction.

9. The forwarding of charges, as was done in this case, was a standing operating procedure within the Eighth Army, designed to facilitate the orderly and expeditious administration of military justice. I did not consult either General Van Fleet or Major General O'Daniel in respect to this transaction.

40 10. Neither General Van Fleet nor myself had any personal interest in the outcome of this case. General Van Fleet had no contact with this case.

11. Further deponent sayeth not.

/s/ Chester D. Silvers
CHESTER D. SILVERS
 Colonel, JAGC, 0-39564

Sworn to before me this
 4th day of June 1953.

/s/ Joseph L. Chalk
JOSEPH L. CHALK
 MAJOR JAGC

* * * * *

41 [Filed September 30, 1957]

O P I N I O N

This is a petition for a Writ of Habeas Corpus filed by John E. Day, Jr., a resident of the District of Columbia and an enlisted member of the United States Army who, at the time of filing his petition, was detained under sentence of death imposed by a General Court-Martial convened in Korea October 1, 1951, for murder in violation of the 92nd Article of War and for assault with a deadly weapon with intent to do great bodily harm in violation of the 93rd Article of War.

The Court-Martial proceedings were approved by the convening authority and subsequently the conviction and sentence were affirmed by the Board of Review in the Office of the Judge Advocate General.

The United States Court of Military Appeals affirmed the decision of the Board of Review. United States vs. Day, 2 USCMA 416, 9 CMR 46 (1953).

On June 30, 1954, the conviction and sentence were confirmed and ordered executed by the President of the United States acting under
 42 Article 71 of the Uniform Code of Military Justice, 50 USC §658(a).

On August 10, 1954, the pending petition for a Writ of Habeas Corpus was filed in this Court which, in subsequent proceedings and upon motion of the respondents, dismissed the petition for lack of jurisdiction. From the order of dismissal, an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, but prosecution of the appeal was postponed.

The petitioner was transferred by the Army to the United States Disciplinary Barracks at Ft. Leavenworth, Kansas, under the Court-Martial sentence of death and while there, he filed a petition for a Writ of Habeas Corpus in the United States District Court for the District of Kansas. After a full hearing, that Court discharged the writ theretofore issued and remanded the petitioner to the custody of the Commandant of the Disciplinary Barracks. On appeal, that order was affirmed by the United States Court of Appeals for the Tenth Circuit. Day vs. Davis, 235 F 2d 379. The Supreme Court denied certiorari, Day vs. Davis, 352 U.S. 881, and denied a petition for rehearing. Day vs. Davis, 352 U.S. 913.

Thereafter, the United States Court of Appeals for the District of Columbia Circuit, in ruling upon the postponed appeal from the Order of this Court dismissing the petition filed here, held that this Court did have jurisdiction and remanded the case here for further proceedings. Day vs. Wilson, et al., ____ D. C. App. ____, ____ F 2d ____.

Upon remand to this Court, petitioner filed an amended petition in which, in addition to renewing his assertions that he had been denied basic constitutional rights, he asserted new grounds for relief alleging
43 that the General Court-Martial which tried, convicted and sentenced him was without jurisdiction.

The contentions of the petitioner may be summarized as follows:

1. The General Court-Martial which tried, convicted and sentenced the petitioner was without jurisdiction.
2. The petitioner was denied the effective assistance of counsel in proceedings following his trial, and conviction and sentence to death.
3. The Court of Military Appeals in affirming the conviction and sentence of petitioner deprived him of due process of law and the equal protection of the laws in respect of the law officer's failure properly to instruct the Court.
4. The allegations of the petitioner as to the President's review of the proceedings are effective, if true, to void his approval thereof

and render the continued detention of the petitioner by virtue thereof, unlawful.

1. THE JURISDICTIONAL QUESTION

Petitioner alleges that the Staff Judge Advocate of the Eighth Army, without the knowledge of or without consulting the Commanding General of the Eighth Army, transferred Court-Martial jurisdiction over the petitioner from the Commanding General, Eighth Army, to the Commanding General, I Corps, who convened the General Court-Martial which tried, convicted and sentenced the petitioner; that this was a transfer of jurisdiction to a subordinate command not authorized by the Uniform Code of Military Justice; even if such transfer was authorized, the reason therefor must appear in the record and, further, assuming that the Commanding General, Eighth Army, had the power

44 to transfer jurisdiction to his subordinate command, this was a judicial function which must be personally exercised by the Commanding General and not by the Staff Judge Advocate.

A careful review of the procedures followed establishes that the Court-Martial which tried the petitioner was legally constituted and the petitioner suffered no prejudice by the transfer of jurisdiction.

The affidavit of the Staff Judge Advocate of the Eighth Army in Korea at the time of the transfer makes clear that the action taken was solely in the interest of orderly procedures and the forwarding of the charges was a standing operating procedure within the Eighth Army designed to facilitate the orderly and expeditious administration of military justice. In this case the transfer was to a subordinate command but there can be no question as to the jurisdiction of that command over such an offense.

There is nothing in the Uniform Code of Military Justice or the Manual for Courts-Martial which negates such transfer of jurisdiction, and there is no showing that the petitioner was in any wise prejudiced.

Seoul, near which I Corps headquarters was located, was the situs of the alleged offenses and the location of several key witnesses,

whereas the Eighth Army headquarters was located in Taegu which is about 175 miles southeast of Seoul.

No provision is found in the Uniform Code of Military Justice or in the Manual for Courts-Martial requiring that an accused be tried by a General Court-Martial convened by the command to which he or his unit is assigned or attached. As was stated in Wade vs. Hunter, 336 U.S. 684, 692:

45 "At least in the absence of charges of bad faith on the part of the Commanding General, Courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges."

In this case there has been no charge or even suggestion of bad faith in the transfer of the petitioner.

With respect to petitioner's further contention that the transfer of jurisdiction was a judicial function which must be personally exercised, the Court is of the opinion that the decision was wholly an administrative function normally performed by a staff officer in accordance with standing operating procedure established by the Commanding General and as such, even if taken without his personal knowledge, was nevertheless his act. The Court is of the opinion that the General Court-Martial which tried, convicted and sentenced the petitioner had jurisdiction to do so.

2. EFFECTIVE ASSISTANCE OF COUNSEL

A review of the record conclusively establishes that the petitioner had competent counsel in every step of the proceeding both before his conviction and sentence and in all of the proceedings thereafter taken before the several reviewing bodies and every reasonable facility was afforded counsel in that representation.

3. THE CLAIM OF PETITIONER THAT HE WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BEFORE THE COURT OF MILITARY APPEALS

This claim is based primarily upon the contention that the instructions of the law officer to the General Court-Martial were deficient

in failing to include the lesser included offense of unpremeditated murder. The United States Court of Military Appeals passed upon this contention adversely to the petitioner. The instructions of the
46 law officer were quoted and discussed at some length in Day vs. Davis, supra, commencing at page 393. The conclusion of the United States Court of Appeals for the Tenth Circuit was that "any deficiencies in the instructions are not of a character that presents a question open to review in habeas corpus."

The petitioner contends that the Court in Day vs. Davis, supra, did not pass on the precise constitutional issue raised in the pending petition. Petitioner says he complains, not of error at the Court-Martial, but of "his singling out by the Court of Military Appeals for invidious treatment" and petitioner cites a number of decisions of that Court which he contends are inconsistent with the decision of the Court in sustaining the sufficiency of the charge in his case. He says he has thereby been denied due process of law in violation of the Fifth Amendment.

No authority is cited in support of the power of this Court to grant relief by habeas corpus because a decision of an appellate court is inconsistent with other of its decisions.

4. PETITIONER'S CLAIM THAT THE APPROVAL OF THE CONVICTION AND SENTENCE BY THE PRESIDENT IS UNLAWFUL.

Petitioner contends that Presidential review of a Court-Martial sentence extending to death is judicial requiring consideration of the entire record; that the President did not consider the entire record of the proceedings but he did consider matters outside the record and he received advice from his counsel and from the Pardon Attorney, Department of Justice, without notice to the petitioner. Petitioner therefore contends that a consideration of such matters and advice
47 from the Pardon Attorney constituted a violation of petitioner's rights under the Sixth Amendment and that he was deprived of his right of confrontation and legal representation.

In this case the petitioner's counsel did file a brief for consideration by the President. The petitioner has not cited any authority in support of his right to a personal appearance before the President. Article 71 of the United States Code of Military Justice, 50 USC §658 (a), dealing with sentences requiring Presidential approval, provides that "He shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit * *." The record in this case contains a memorandum dated June 30, 1954 signed by the President as follows:

"In the foregoing case of Private E-2 John E. Day, Jr. RA 13233886, 46th Transportation Truck Company, the sentence is approved and will be carried into execution under the orders of the Secretary of the Army."

The usual presumption of regularity attaches to this official action and presents no problem within the competence of this Court to review.

CONCLUSION

The foregoing recital makes abundantly clear that the petitioner has been afforded every constitutional right. He was tried by a General Court-Martial under procedures established by Congress acting pursuant to the Constitution which puts the regulation of the armed forces in the Congress. His conviction was affirmed by the United States Court of Military Appeals which is the established tribunal to review proceedings of this character. Thereafter, his conviction and sentence were confirmed and ordered executed by the President of the United States.

48 Acting in accordance with the mandate of the United States Court of Appeals for the District of Columbia Circuit, the Court has carefully reviewed the entire record and finds no basis upon which the petitioner is entitled to release on the requested Writ of Habeas Corpus. Therefore, the prayers of the amended petition will be denied and the petition dismissed.

Counsel for respondents will submit an order in accordance with the foregoing.

/s/ Joseph C. McGarraghy
JUDGE

September 30, 1957

49 [Filed September 30, 1957]

O R D E R

This matter having come before the court pursuant to a petition for a writ of habeas corpus and an amended petition for a writ of habeas corpus, and respondents' ^{return} ~~writs~~ and answers thereto, and upon consideration of the foregoing, arguments adduced by respective counsel in open court and supplemental memoranda filed by both parties, it is by the Court this 30th day of September, 1957,

ORDERED, in accordance with the opinion of this Court dated September 30, 1957, that the petition and amended petition for a writ of habeas corpus be dismissed and the rule to show cause discharged,

FURTHER ORDERED that respondents, Charles E. Wilson, Secretary of Defense, Wilbur M. Brucker, Secretary of the Army, and Maxwell D. Taylor, Chief of Staff, United States Army, or whoever acting under their orders or the orders of any of them, are hereby directed to stay execution of the sentence of death against the petitioner John E. Day, Jr., for a period of thirty days pending appeal.

/s/ Joseph C. McGarraghy
JUDGE

* * * * *

50 [Filed October 14, 1957]

N O T I C E O F A P P E A L

Notice is hereby given this 14th day of October, 1957, that JOHN E. DAY, JR., the petitioner herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the order of

this Court entered on the 30th day of September, 1957, dismissing the amended petition for writ of habeas corpus.

/s/ Harry E. Wood

Harry E. Wood

/s/ Guy Emery

Guy Emery

Attorneys for Petitioner

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**HEADQUARTERS
69TH TRANSPORTATION TRUCK BATTALION
APO 301**

201 - Day, John E. (Enl)

17 May 1951

SUBJECT: Investigation UR AW 46b

TO: Captain Lonzie McKeithen
95th Trans Car Company
APO 301

1. Under the provisions of Articles of War 46b and 24, you are hereby appointed Investigating Officer to inquire into the truth of the matter set forth in the charges, the form of the charges, and to secure information upon which to determine what disposition should be made of the case against Private-2 John E. Day, RA13233886, 46th Transportation Truck Company, APO 301.

2. A formal report by indorsement hereon will be made to this headquarters at the earliest practicable date.

BY ORDER OF MAJOR FOSS:

1 Incl

Court-Martial Charges
w/allied papers

/s/ William J. Lynch

Capt., TC
Adjutant

**HEADQUARTERS
46TH TRANSPORTATION TRUCK BATTALION
APO 301**

13 May 1951

SUBJECT: Transmittal of Charges

TO: Commanding Officer
69th Transportation Truck Battalion
APO 301 - U.S. Army

1. In compliance with paragraph 32, MCM 1949, forwarded herewith are Court Martial Charges in the case of Private-2 John E. Day Jr., RA 13233886, member of this organization.

2. Summary of expected testimonies upon which charges are based are attached hereto as inclosures.

3. Documentary evidence and exhibits relative to the charges are attached hereto.

4. Character of military service of the accused prior to offenses here charged: _____.

5. In my opinion Private-2 Day should be eliminated from the service.

6. The investigation conducted by agents, CID, revealed that, the Carbine used by Day, had been issued to Corporal Jewel Gill, RA 18270603, 49th Transportation Truck Company, APO 301.

7. I recommend trial by General Court-Martial.

/s/ Leland S. Gregerson

Captain TC
Commanding

201-Day, John E. (Enl) 2nd Ind.
RA13233886 (17 May 51)

SUBJECT: Investigation UP AW 46b

HEADQUARTERS, 69TH TRANSPORTATION TRUCK BATTALION,
APO 301., 15 Jun 51.

THRU: Commanding Officer, 351st T Hwy Trans Group, APO 301.

TO: Commanding General, Hqs EUSAK, APO 301, Attn: Staff Judge Advocate.

Concur in finding of Investigating Officer.

FOR THE COMMANDING OFFICER:

/s/ Jim T. Kruse

Capt. Arty
Adjutant

3rd Ind

/apg

Hq 351st T Hwy Trans Gp, APO 301, 24 June 1951

TO: Commanding General, Eighth U.S. Army Korea (EUSAK), APO 301

ATTN: KJA

Recommend trial by General Court Martial.

/s/ Henry G. Lagarde

Colonel, TC
Commanding

AG 201-Day, John E. (Enl) KJA 4th Ind
 RA13233886 (17 May 51)
 SUBJECT: Investigation UP AW 46b

27 Jun. 1951

CDS/jjm

HEADQUARTERS EIGHTH UNITED STATES ARMY KOREA (EUSAK),
 APO 301,

TO: Commanding General, I Corps, APO 358

In view of the circumstances, it is requested that your headquarters exercise disciplinary jurisdiction in subject case.

BY COMMAND OF LIEUTENANT GENERAL VAN FLEET:

/s/ C.O. OVERSTREET

1 Incl
 Charge Sheet
 w/allied papers

Capt. AEG
 Asst. AG

HEADQUARTERS I CORPS
 APO 358, United States Army

SPECIAL ORDERS
 NUMBER 228

22 September 1951

EXTRACT

1. A general court-martial is hereby ordered to convene at Hq I Corps APO 358 at 0900 hours on 23 September 1951 or as soon thereafter as practicable for the trial of such persons as may properly be brought before it. The court will be constituted as follows:

LAW OFFICER

Colonel MINOR K WILSON 041626 IG Hq I Corps certified in accordance with Article 26a.

MEMBERS

COL LOGAN CLARKE 017713 AGC Hq I Corps
 COL WILBUR M. GRIFFITH 0471964 Arty Hq I Corps Arty
 LT COL HERBERT W WURTZLER 039596 Ord Hq I Corps
 LT COL HAROLD P MILLER 0316852 GSC Hq I Corps
 MAJ LAWRENCE T MILLER 0417964 MSC 559th Med Amb Co
 MAJ MARVIN O SMITH 01173463 AGC Hq I Corps
 CAPT ELEMER COLE 01307659 QMC 130th QM Bak Co
 CAPT JAMES H WILLIAMS 02047543 MSC 559th Med Amb Co

COUNSEL

Captain RAWLS H FRAZIER 061697 JAGC Hq I Corps TRIAL
COUNSEL certified in accordance with Article 27b.

Lieutenant Colonel LYSLE I ABBOTT 034559 JAGC Hq I Corps
DEFENSE COUNSEL certified in accordance with Article 27b.

First Lieutenant WAYNE G. WILLIAMS 0984099 JAGC Hq I
Corps ASSISTANT DEFENSE COUNSEL certified in accordance with
Article 27b.

BY COMMAND OF MAJOR GENERAL O'DANIEL:

OFFICIAL:

/s/ Joseph R. Aldridge

WOJG USA
Asst AG

RINALDO VAN BRUNDT
Brig Gen, GSC
Chief of Staff

DISTRIBUTION:

X

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LO: The Court is advised that the elements of the offenses charged
are as follows: a. As to Charge I:

- (1) That the accused unlawfully killed a certain person named by
certain means, as alleged;
- (2) That the victim is dead;
- (3) That death resulted from an injury received by the victim;
- (4) That such injury resulted from an act of the accused;
- (5) That death occurred within a year and a day of such act;
- (6) That such killing was with malice aforethought; and,
- (7) That the killing was premeditated.

The court is referred to paragraph 179a, pages 230-232, Manual
for Courts-Martial 1949, for a discussion of the offense of murder
and the meaning of the terms "malice aforethought" and
"premeditation".

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Among the lesser included offenses of premeditated murder are

unpremeditated murder, voluntary and involuntary manslaughter, attempt to commit murder and certain forms of assault.

b. The elements of the offense charged in the specification to Charge II are as follows:

- (1) That the accused assaulted a certain person with a certain dangerous weapon; as alleged; and
- (2) That the weapon was used in a manner likely to produce death or great bodily harm.

The court is referred to paragraph 1801 at page 247, Manual for Courts-Martial 1949, for a discussion of the offense of assault with intent to do bodily harm with a dangerous weapon.

c. The elements of the offense charged in the specification to Charge III are as follows:

- (1) That the accused assaulted a certain female by taking indecent liberties with her person, as alleged; and
- (2) That such acts were done with intent to gratify the lust or sexual desires of the accused.

The court is referred to paragraph 183c at page 258, Manual for Courts-Martial 1949, for a discussion of the offense of indecent assault.

The court is further referred to paragraph 154, sub paragraph (2), Manual for Courts-Martial 1951, for a discussion of voluntary drunkenness as affects intent. I quote:

"A temporary loss of reason which accompanies and is part of a drunken spree and which is not the result of delirium tremens or some other mental defect, disease, or derangement is not insanity in the legal sense. It is a general rule or law that voluntary drunkenness not amounting to legal insanity, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; but such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to pre-

premeditate a design to kill, when either matter is a necessary element of the offense.

Evidence of drunkenness should be carefully scrutinized, as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act."

The court is further advised:

First, that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

Second, that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt shall be resolved in favor of the accused and he shall be acquitted;

Third, that if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

Fourth, that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the Government.

The rule as to reasonable doubt extends to every element of the offenses charged.

In addition to the instructions I have given you, you should observe the rules set forth in paragraph 74a, Manual for Courts-Martial. The final determination as to the weight of the evidence and the credibility of the witnesses in this case rests solely upon you members of the court. You must disregard any comment or statement made by me during the course of the trial which may seem to indicate an opinion as to the guilt or innocence of the accused, for you alone have the independent responsibility of deciding this issue. Each of you must impartially resolve the ultimate issue as to the guilt or innocence of the accused in accordance with the law, the evidence admitted in court, and your own conscience.

Two-thirds of the members present at the time the vote is taken is required for a conviction of any of the three offenses, only the required fraction of two-thirds will be announced in your findings. The procedure which you are to follow in your deliberation is prescribed in the foot note at the bottom of Page 518, Manual for Courts-Martial, 1951. Inasmuch as we are proceeding partly under
 79 the Manual for Courts-Martial, 1949, and partly under the Manual for Courts-Martial, 1951, I will leave both volumes here for your use. Is there anything further from either the trial counsel or the defense counsel?

TC: No sir.

DC: No sir.

LO: The court will be closed.

* * * * *

Before the
 PRESIDENT OF THE UNITED STATES
 For action under
 Article 71(a), Uniform Code of Military Justice

UNITED STATES

v.

PRIVATE E-2 JOHN E. DAY, JR. (RA 13233886),
 46th Transportation Truck Company

BRIEF ON BEHALF OF JOHN E. DAY, JR.

On October 1, 1951, Private E-2 John E. Day, Jr., a 22-year-old Negro, was convicted by a general court-martial convened at Headquarters I Corps in Korea of the premeditated murder of Lee Hak Chun, a Korean civilian, by shooting him with a carbine in violation of Article of War 92 and of assaulting Kim Chung Hi, the wife of Lee, with intent to do her bodily harm by striking her on the head with a carbine in vio-

lation of Article of War 93. At the same trial, Day was found not guilty of wrongfully and indecently assaulting Kim in violation of Article of War 96. He was sentenced to be put to death.

The convening authority approved the finding and sentence, and a board of review in the Office of the Judge Advocate General of the Army affirmed. On April 30, 1953, the United States Court of Military Appeals, with one judge dissenting, affirmed. On July 22, 1953, the Court of Military Appeals denied Day's petition for rehearing.

The sentence of Day to death is, in the premises, before the President for his action pursuant to Article 71(a), Uniform Code of Military Justice.

Assignments of Error

It is represented on behalf of Day that the following errors, and each of them, in the proceedings of his trial serve to invalidate his conviction and require disapproval of his sentence by the President:

1. The law officer of the general court-martial erred in failing to instruct the Court as to the elements of lesser included offenses in premeditated murder as required by Article 51(c), Uniform Code of Military Justice.

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REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

No. 14, 203

FILED JAN 22 1958

JOHN E. DAY, JR.,

Joseph W. Stewart
CLERK

Appellant,

v.

NEIL H. McELROY,
Secretary of Defense, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY E. WOOD

917 Fifteenth Street, N. W.
Washington 5, D. C.

Attorney for Appellant

Of Counsel

GUY EMERY

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

United States Court of Appeals
For the
District of Columbia Circuit

No. 14, 203

FILED APR 21 1958

Joseph W. Stewart
CLERK

JOHN E. DAY, JR.,

Appellant,

v.

NEIL H. McELROY, Secretary of Defense
WILBER M. BRUCKER, Secretary of the Army

and

MAXWELL D. TAYLOR, Chief of Staff, U. S. Army,

Appellees.

PETITION FOR REHEARING EN BANC

Appellant, by his attorney, and pursuant to Rule 26(a) of the Rules of this Court, respectfully submits to the Court his timely petition for rehearing en banc. In support of appellant's petition, he assigns the following grounds:

Appellant is, and has been for nearly four years, under sentence of death. His appeal from an order of the United States District Court for the District of Columbia presents two important, and novel,¹ issues:

¹ Neither appellant nor appellees brought to the Court's attention any case involving either of these precise issues, and the per curiam opinion of the Court is also silent with respect to prior judicial consideration of them. Appellant believes it is fair to say, then, that both issues are novel. Their importance, quite apart from the fact that this is a capital case, cannot seriously be doubted. See appellant's Brief, p. 8.

first, the question whether, under the provisions of Article 22, Act of May 5, 1950, c. 169, 64 Stat. 115, 50 U.S.C., Section 586,² and Paragraphs 5 and 35, Manual for Courts-Martial, United States, 1951, the general court-martial which tried, convicted and sentenced appellant to death was without jurisdiction over appellant in the circumstances of this case; and second, the question whether, in the course of mandatory review proceedings on appellant's conviction and sentence, he was so deprived of due process of law and equal protection of the laws by the United States Court of Military Appeals as to rob the military reviewing authorities of jurisdiction in the sense of the power to act on his conviction and sentence.

On April 10, 1958, in a per curiam opinion, the Court, Fahy, Circuit Judge, concurring, held that "We find nothing in the record that would have justified the District Court in issuing the writ."³ The contentions advanced in appellant's Brief and Reply Brief have, therefore, been held to be unpersuasive. In the circumstances, appellant can no more than respectfully submit, for the reasons and under the authorities heretofore advanced in his Brief and Reply Brief, that the Court has erred in so holding.

In any event, however, appellant urges that the importance and novelty of the issues here raised and decided per curiam, would justify the granting of his petition for rehearing en banc even were this not a capital case.

For the foregoing reasons, it is respectfully requested that appellant's petition for rehearing en banc be allowed. It is further

² Now 10 U.S.C., Section 822 (Supp. V, 1958).

³ In the opinion of the concurring judge, there is a serious question whether the general court-martial which tried, convicted and sentenced appellant was properly instructed, but "the inadequacy which existed was not so grave as to have deprived appellant of due process of law or of any other constitutional right, or to have deprived the court-martial of jurisdiction."

respectfully requested that the order of this Court of October 28, 1957, staying and restraining appellees from executing the sentence of death upon appellant pending hearing and disposition of the appeal herein, be continued in full force and effect.

Respectfully submitted,

/s/ Harry E. Wood

HARRY E. WOOD

917 Fifteenth Street, N. W.
Washington 5, D. C.

Attorney for Appellant

Of Counsel:

GUY EMERY

CERTIFICATE

Pursuant to Rule 26(a) of the Rules of this Court, I, as attorney for John E. Day, Jr., appellant in the above cause, hereby certify that the foregoing petition for rehearing en banc is presented in good faith and not for delay.

/s/ Harry E. Wood

HARRY E. WOOD

(i)

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UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 14, 203

JOHN E. DAY, JR.,

Appellant,

v.

NEIL H. McELROY,
Secretary of Defense, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

Appellees advance three major arguments: that the United States District Court for the District of Columbia lacked jurisdiction to entertain appellant's petition and amended petition for a writ of habeas corpus; that the general court-martial which tried, convicted and sentenced appellant had jurisdiction over his person; and that he was not deprived of constitutional protections by the United States Court of Military Appeals. For the reasons and under the authorities hereinafter appearing and those set forth in the Brief for Appellant herein, there is no merit in any of these contentions.

I

**The United States District Court For The District
Of Columbia Had Jurisdiction Over Appellant's
Petition And Amended Petition For A Writ of
Habeas Corpus.**

The question of whether the United States District Court for the District of Columbia had jurisdiction to entertain appellant's petition for a writ of habeas corpus was, or should have been, finally resolved almost a year ago by this Court's holding in Day v. Wilson, _____ U.S. App. D.C. _____, 247 F.2d 60 (1957). On remand, appellant, by leave of court, filed an amended petition for a writ of habeas corpus (App. 17). In their brief below, notwithstanding the opinion of this Court, appellees still advanced the issue of lack of jurisdiction to entertain the petition and amended petition for a writ of habeas corpus (App. 23). On oral argument before the District Court, the contention was abandoned.¹

Appellees again attempt to avoid this Court's prior decision respecting jurisdiction by urging that the filing of appellant's amended petition for a writ of habeas corpus somehow worked to deprive the court below of jurisdiction. The contention has no more merit now than when previously advanced and abandoned. The basic fallacy in it is easy to identify: appellees simply assume, erroneously, that the United States District Court for the District of Columbia took jurisdiction of appellant's habeas corpus petition in May, 1957, at which time he was confined in Kansas (Appellees' Brief, 7).² The said District Court in fact acquired jurisdiction in the matter in August, 1954, upon the filing of appellant's petition for the writ of habeas corpus while confined in Japan. Day v. Wilson, et al., _____ U.S. App. D.C. _____, 247 F.2d 60 (1957). None of the events which have occurred subsequent

¹ See Points and Authorities in Opposition to Respondents' Return and Answer to Amended Petition for the Writ of Habeas Corpus, p. 6, Day v. Wilson, et al., H. C. 71-54.

² Ahrens v. Clark, 335 U.S. 188 (1948), and the cases following it in time or rationale, on which appellees rely, all treat petitions for habeas corpus by prisoners confined in one district, but seeking to invoke the jurisdiction of a district court not in the district in which they were confined. None of these cases has any relevance here.

to the said District Court's acquisition of jurisdiction in 1954, including specifically, the filing of an amended petition for a writ of habeas corpus in 1957, robbed the District Court of jurisdiction. Hardenbergh v. Ray, 151 U.S. 112, 118 (1893); Mullen v. Torrance, 9 Wheat. (22 U.S.) 537, 539 (1824); Grant County Deposit Bank v. McCampbell, 194 F. 2d 469, 472 (6th Cir. 1952); Boynton v. Moffat Tunnel Improvement District, 57 F. 2d 772, 778 (10th Cir. 1932), cert.denied 287 U.S. 620 (1932); Tug River Coal & Salt Company v. Brigel, 86 Fed. 818, 819-821 (6th Cir. 1898); Lanigan v. Boston Terminal Corporation, 112 F. Supp. 957, 958 (D.C. Mass. 1953); see also ex parte Endo, 323 U.S. 283, 304-307 (1944); ex parte Catanzaro, 138 F. 2d 100 (3d Cir. 1943), cert. denied 321 U.S. 793 (1944); United States ex rel. Circella v. Neelly, 115 F. Supp. 615 (D.C. Ill. 1953), aff'd. sub nom. United States ex rel. Circella v. Sahli, 216 F. 2d 33 (7th Cir. 1954); ex parte Flick, 76 F. Supp. 979 (D.C.D.C. 1949). The District Court had, and appellees properly admitted that it had, jurisdiction to entertain appellant's amended petition for a writ of habeas corpus.

II

The General Court-Martial Which Tried, Convicted and Sentenced Appellant Was Without Jurisdiction Over Him.

Appellees do not attempt to deny that Day was attached, for purposes of general court-martial jurisdiction, to Eighth Army (App. 12, 30, 40). The Commanding General, Eighth Army, was, therefore, the officer who possessed general court-martial jurisdiction over him (App. 12). It is also undisputed that letter orders and charges against him officially came into the hands of the Commanding General, Eighth Army, who had general court-martial jurisdiction over appellant (App. 39-40).

The letter orders and charges against appellant were transmitted from Eighth Army to the Commanding General, I Corps, with the request that he "exercise disciplinary jurisdiction in subject case." (App. 41). The validity, or lack of validity, of any action subsequently taken against appellant by the Commanding General, I Corps, or a general court-martial convened by him, turns squarely on the legality or illegality of such purported transfer of general court-martial jurisdiction over appellant. If the Commanding General, I Corps, acquired general court-martial jurisdiction over appellant in this case, he did so only by virtue of the purported transfer thereof of June, 1951 (App. 30, 39-41).³ Such transfer being in violation of law, each consequence thereof is also without authority in law and invalid.

The main thrust of appellees' argument respecting the purported transfer of general court-martial jurisdiction over appellant appears to be that the Commanding General, Eighth Army, might in any event lawfully transfer such jurisdiction to his subordinate in command of I Corps. Article 22, Uniform Code of Military Justice, 50 U. S. C., Section 586, and Paragraph 35, Manual for Courts-Martial, United States, 1951,⁴ supply the complete answer.

The power of the Commanding General, Eighth Army, with respect to the disposition of the charges against appellant received by him some time between June 24 and June 27, 1951, was founded upon, but also circumscribed by, the provisions of Article 22 and paragraph 35. The exercise of a presumed power to transfer general court-martial jurisdiction over appellant by transmitting charges against him to a subor-

³ Appellees' suggestion that the charges upon which appellant was tried were referred "directly" to the Commanding General, I Corps, completely ignores both this fact and the fact that the "direct" referral was by 18th indorsement to the original letter orders of May 17, 1951 (R. 60). Indeed, the record strongly suggests that the charges upon which appellant was tried, or at least those charges against him which were reinvestigated, were the same charges of May 13, 1951, which Colonel Silvers purported to transmit to I Corps (R. 28).

⁴ Appellees' Brief is devoid of any mention of Paragraph 35. Cf. Brief for Appellant, 10-15.

dinate being unlawful,⁵ all that followed was null and void.

That the "transfer of charges from one commanding officer vested with authority to convene to another such officer vested with similar authority is often required * * *" (Appellees' Brief, 9) is neither disputed nor material here. The Code, implemented by the Manual, plainly empowers a commanding officer vested with convening authority to forward charges to superior competent authority, and only to superior competent authority, when such a transfer is required. See Appellant's Brief, 11. This results, not in vesting general court-martial jurisdiction according to chance as appellees suggest (Appellees' Brief, 9), but in so vesting it in a particular case according to the chain of command.⁶ The transmission of charges from the commander of an Army to a subordinate commander of an Army Corps, the situation here, is neither often required nor authorized by law.

In a transparent attempt to force the facts of this case within the framework of the supposed holding of the Supreme Court in Wade v. Hunter, 336 U.S. 684 (1949), appellees state that "the transmission of charges from [Eighth Army to I Corps] * * * was dictated by the tactical situation existing in September, 1951" (Appellees' Brief, 9a). This is untrue (App. 30).⁷ Further, in Wade v. Hunter, supra, the Supreme Court was not asked to approve a transfer of charges from superior competent authority to an inferior, nor did the Court do so either expressly or implicitly. Wade was tried by general court-martial convened by the Commanding General, 76th Division. Subsequently, the convening authority transmitted the charges against Wade to the Commanding General,

5

Appellees have cited no authority whatsoever for such power, and appellant has been unable to find any.

6

Any other principle would negate the efforts of the framers of the Code to deal with perhaps the most troublesome problem facing them: that of "command control". House Report No. 491, 81st Congress, 1st Session, p. 7 (1948).

7

It is difficult in any event to perceive the materiality of the tactical situation in September, 1951; the transmission occurred some three months earlier.

Third Army, a superior competent authority. Appellant, believing that the Supreme Court's decision in Wade v. Hunter bears only on the single issue of former jeopardy, does not rely upon it. If that case touches this one, however, it defeats, not sustains, appellees' contention.

In view of what has been said hereinabove, appellant submits that the Court may find it unnecessary to consider the effect of the exercise, by the Staff Judge Advocate, Eighth Army, of a power which, if it existed at all, appellant contends could only have been personally exercised by the Commanding General, Eighth Army. The suggestion that the decision to transfer general court-martial jurisdiction over appellant to I Corps was in fact General Van Fleet's failure to blur either the facts (App. 29-31)⁸ or the law. Assuming the existence of any such power on the part of an officer possessing general court-martial jurisdiction into whose hands charges may come as that purported to be exercised by Colonel Silvers, the power is non-delegable and appertains personally to the commanding officer.⁹ Paragraph 35, Manual for Courts-Martial, United States, 1951; Runkle v. United States, 122 U.S. 543 (1887).

To say that appellant "does not attack the standing operating procedure"¹⁰ (Appellees' Brief, 10) established by Colonel Silvers, insofar as any such alleged procedure affects appellant, is absurd. Of course he attacks it. He says it is in blatant violation of the Code and the Manual. It is respectfully submitted that the lower court erred in holding that the Code and the Manual do not negate the purported transfer of court-martial jurisdiction over appellant from the Commanding General, Eighth Army, to the Commanding General, I Corps.

⁸ Colonel Silvers' affidavit was obtained not by appellant, but by officers of appellees.

⁹ Suppose, for example, that General Van Fleet were the accuser. If the Staff Judge Advocate may lawfully do what was done in this case as an administrative detail, the provisions of Article 22 are meaningless.

¹⁰ That the Army has authorized the use of standing operating procedures seems quite irrelevant, unless appellees intend to argue that illegal acts lose their taint by the simple fact of being standard procedure.

III

**The Military Reviewing Authorities Deprived
Appellant Of Constitutional Protections And
Thereby Lost Jurisdiction To Act On His
Conviction And Sentence.**

In the Brief for Appellant, it is contended that the United States Court of Military Appeals, in affirming appellant's conviction and sentence, deprived him of due process of law and the equal protection of the laws in respect of the law officer's failure to instruct the court-martial concerning the elements of the lesser included offense of unpremeditated murder. It is further asserted that this deprivation entitles appellant to relief on habeas corpus.¹¹

Appellees appear to recognize that if appellant was subjected to unjustifiable discriminatory treatment by the United States Court of Military Appeals, the lower court had ample power on habeas corpus to make the constitutional guarantees of due process and equal protection of the laws meaningful to appellant. Cf. United States v. Palermo, 152 F.Supp. 825 (D. C. Pa. 1957); Neild v. District of Columbia, 71 App. D. C. 306, 110 F.2d 246 (1940). Appellees assert, however, that the United States Court of Appeals did recognize its own mandate, and that the said Court did conclude that such instruction was given (Appellees' Brief, 11).

Even if accurate, this would beg the question. Concededly, the United States Court of Military Appeals concluded that "for all practical purposes", an instruction on the lesser included offense of unpremeditated murder had been given (Appellant's Brief, 16).¹² The nub of the issue, assuming the facts supported the conclusion, is whether the rather startling concept that instructions need only be given generally, or

¹¹ The holding of the court below on this phase of the case was that "No authority is cited in support of the power of this Court to grant relief by habeas corpus because a decision of an appellate court is inconsistent with other of its decisions" (App. 35).

¹² There is a substantial difference between the actual conclusion of the Court of Military Appeals and appellees' view of that conclusion.

casually, or for all practical purposes, did not constitute an unequal and discriminatory treatment of appellant.

In truth, there is a more shocking fact: that the law officer of the general court-martial which tried, convicted and sentenced appellant did not instruct such court-martial as to the elements of the lesser included offense of unpremeditated murder is plain¹³ (App. 42-45). What he did instruct, and all that he instructed, in this respect was that "Among the lesser included offenses of premeditated murder are unpremeditated murder, * * * " (App. 42-43).

The Court of Military Appeals has never held that instructions need not be given at all. And, in no instance save this to appellant's knowledge, has the Court departed from the recognized mandate of the Code and the Manual¹⁴ to hold that instruction need only be given "for all practical purposes". Appellees tacitly so concede. Manifestly, the standards imposed upon the United States Court of Military Appeals were applied neither equally nor properly to appellant. Because of this, the said Court lost the power to act. Because of this, appellant is entitled to a writ of habeas corpus and to a discharge from unlawful restraint.

Finally, in this connection, if appellees urge, as they seem to urge, (Appellees' Brief, 13) that the United States Court of Appeals for the Tenth Circuit ruled on this contention adversely to appellant in Day v. Davis, 235 F.2d 379 (1956), cert. denied 352 U.S. 881 (1956), rehearing denied 352 U.S. 913 (1956), the argument is untenable. Appellees concede, at page 7 of their Brief, that neither matter here raised was presented to the United States Court of Appeals for the Tenth Circuit. Appellant admits that the said Court of Appeals was asked to hold that the failure of the law officer to instruct on the elements of lesser included

¹³ See also the late Judge Brosman's dissenting opinion quoted at pages 5-6 of Brief for Appellant.

¹⁴ United States v. Clark, 1 USCMA 201, 2 CMR 107 (1952).

offenses fairly raised by the evidence resulted in the denial of a fundamentally fair hearing at appellant's trial by court-martial. It is evident that the Court of Appeals for the Tenth Circuit was not asked to consider, and did not consider, the precise constitutional issue here raised.

CONCLUSION

The United States District Court for the District of Columbia had jurisdiction to entertain appellant's amended petition for a writ of habeas corpus. The Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1951, establish that the convening authority of the general court-martial which tried, convicted and sentenced appellant lacked general court-martial jurisdiction over appellant, and, therefore, the said general court-martial was without jurisdiction. The circumstances shown by the review proceedings on appellant's conviction and sentence are such as to deprive the military authorities of jurisdiction. i. e., the power to act. For both reasons, or either of them, the District Court erred in dismissing appellant's petition and amended petition for a writ of habeas corpus. The order of the District Court should be reversed and the cause remanded with directions to grant the writ and to discharge appellant from custody.

Respectfully submitted,

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,203

JOHN E. DAY, JR., APPELLANT

v.

295

NEIL H. McELROY, Secretary of Defense
WILBER M. BRUCKER, Secretary of the Army,
MAXWELL D. TAYLOR, Chief of Staff, U. S. Army, APPELLEES

Appeal from the United States District Court
for the District of Columbia

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United States Court of Appeals
For the
District of Columbia Circuit

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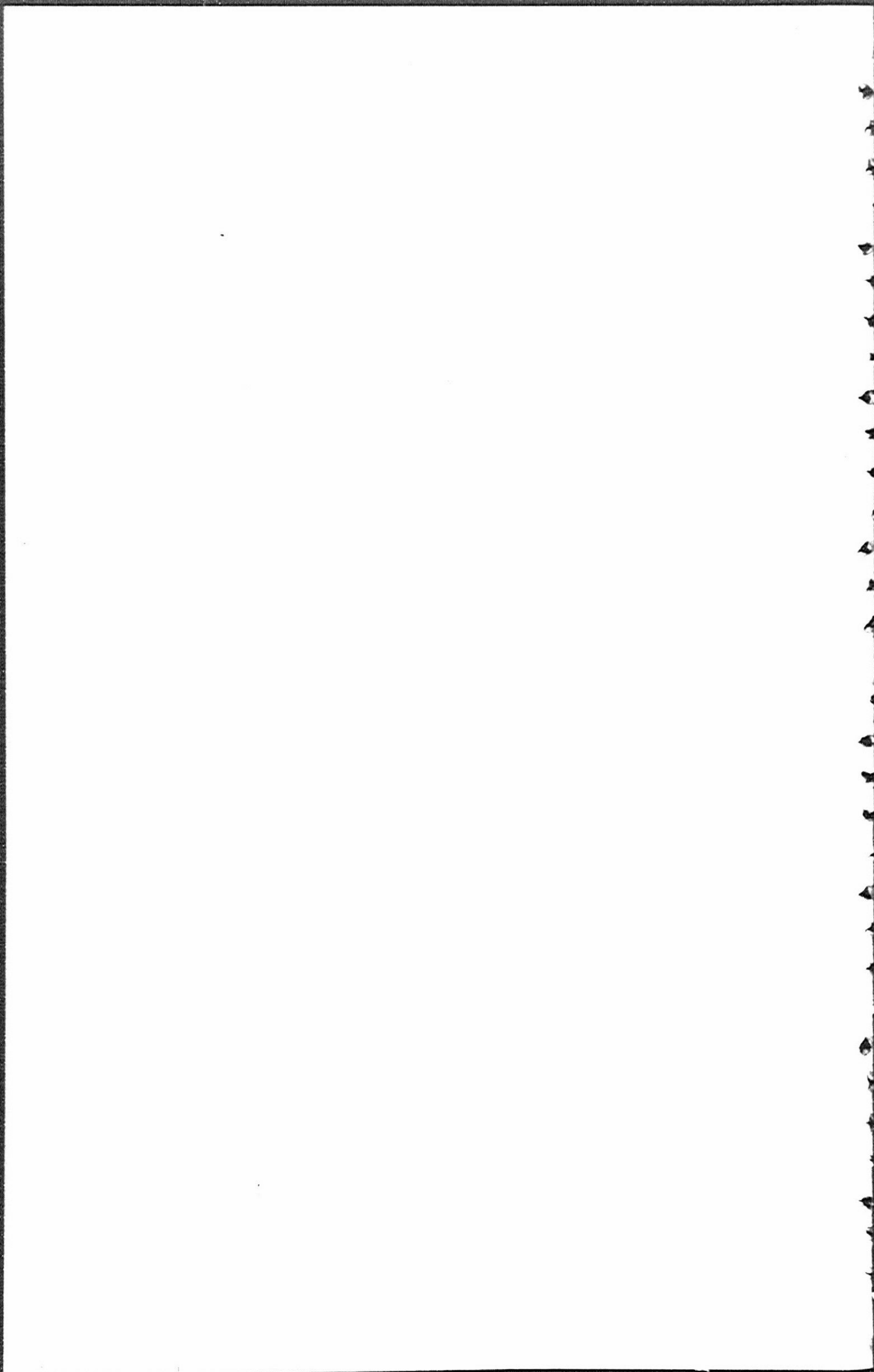
QUESTIONS PRESENTED

This appeal is taken from the District Court's dismissal of an amended petition for a writ of habeas corpus filed by appellant who had been tried and convicted of murder by a court-martial and whose conviction and sentence had received full and complete review by military authorities, including confirmation by the President, and full and complete judicial review by the federal tenth circuit. In the opinion of the appellees, the following questions are presented:

1. Whether the United States District Court for the District of Columbia had jurisdiction over the amended petition for writ of habeas corpus, when appellant was confined in Kansas at the time he filed such petition?

2. Whether the Commanding General of I Corps had jurisdiction to convene a general court-martial to try appellant on certain charges, when appellant's unit was under the operational control of and within the area of responsibility of I Corps in Korea, when such charges were not transmitted to him by any other Commanding General but came to him in due course, and when Article 22(a) of the Uniform Code of Military Justice, 10 U.S.C. § 822(a), provides that "[G]eneral courts-martial may be convened by . . . the commanding officer of . . . an Army Corps"?

3. Did the record support appellant's allegation that he was denied due process and equal protection of the laws by the United States Court of Military Appeals' failure in its review of his case to recognize and apply the principle that a law officer must instruct a court-martial not only as to the elements of premeditated murder but as to the elements of lesser included offenses, when such court in its decision of appellant's case concluded that an instruction had been given by the law officer on the lesser included offense of unpremeditated murder?



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,203

JOHN E. DAY, JR., APPELLANT

v.

NEIL H. McELROY, Secretary of Defense
WILBER M. BRUCKER, Secretary of the Army,
MAXWELL D. TAYLOR, Chief of Staff, U. S. Army, APPELLEES

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE ¹

Appellant was an enlisted man in the United States Army. On the night of December 22, 1950, he was stationed in Seoul, Korea and, there, he was billeted in a building in which Korean civilians were waiting for transportation to Taegu. Seoul was being evacuated by the United Nations forces under pressure of the Chinese Communist offensive (J.A. 29). During the night in this building, an American soldier shot and killed a Korean civilian and beat the decedent's wife with a carbine barrel.

¹ A detailed statement of the facts of the case is found in *Day v. Davis*, 235 F.2d 379 (10th Cir. 1956), *cert. denied*, 352 U.S. 881, *reh. denied*, 352 U.S. 913 and in *Day v. Wilson*, 2 U.S.C.M.A. 416, 9 C.M.R. 46 (1953).

An immediate, on-the-spot-investigation (including the taking of statements from witnesses) was made by a CID officer (J.A. 4; R. 116, 121).² The next day, appellant confessed in writing to having committed both crimes. The evacuation of Seoul was completed on January 4, 1951.

On May 13, 1951, charges against appellant were drawn up and he was advised of them (J.A. 39). Appellant was a member of the 69th Transportation Truck Battalion which had been placed under operational control of the I Corps Headquarters, although the Battalion was a part of the Eighth Army. I Corps Headquarters were in the vicinity of Seoul. Eighth Army Headquarters were at Taegu, which is 175 miles south-east of Seoul. (J.A. 30). The initial charges against appellant with the recommendation that he be tried by general court martial were forwarded to Eighth Army Headquarters (J.A. 40). In June, 1951, the Staff Judge Advocate of the Eighth Army prepared and caused to be sent to the Commanding General, I Corps, over the command line of General Van Fleet (Commander in Chief of the Eighth Army) the following (J.A. 41):

"In view of the circumstances, it is requested that your headquarters exercise disciplinary jurisdiction in subject case."

The Staff Judge Advocate consulted neither General Van Fleet nor General O'Daniel (Commander of I Corps). General Van Fleet had no contact with the case. The Staff Judge Advocate stated that the only reasons for the request were that I Corps Headquarters were located near Seoul and, since Seoul was the situs of the offenses and the location of several key witnesses, it was believed that the proceedings would be facilitated by trial in the Seoul area. Forwarding charges, such as was done in the instant case, was standard operating procedure within

² A record of the court-martial trial, together with other exhibits, were filed in the District Court and are part of the record on appeal in original form.

the Eighth Army and it was designed to facilitate the orderly and expeditious administration of justice. (J.A. 30).

The initial charges were withdrawn because of deficiencies and new charges against appellant were drawn up, investigated and referred to General O'Daniel of I Corps for review and approval (R. 61). A general court-martial was ordered by General O'Daniel to convene on September 23, 1951 (J.A. 41). Appellant, represented by two military counsel, was found guilty of premeditated murder and assault with a dangerous weapon and acquitted of indecent assault. Appellant was sentenced to death.

The record of the court-martial was reviewed by the Staff Judge Advocate who found no errors which materially prejudiced the rights of appellant and who found the sentence legally correct. He recommended the sentence of death be approved (Ex. B, pp. 5-6). The sentence was approved by the convening authority, General O'Daniel.

The record of the court-martial trial was forwarded to the Judge Advocate General of the Army for review by a Board of Review. In February, 1952, it found that the finding of guilt and the sentence were correct in law and in fact and affirmed them. (Exhibit D, p. 12). At the Board of Review, appellant was represented by civilian counsel of his own choice and appointed military counsel who presented a brief and argument in behalf of appellant (Ex. A-1, Ex. C).

The Uniform Code of Military Justice, Art. 67(b)(1), 10 U.S.C. § 867(b)(1), provides that in all cases in which a court-martial sentence, as affirmed by a Board of Review, extends to death it shall be reviewed by the United States Court of Military Appeals. Appellant was represented before the Court of Military Appeals by both military and civilian counsel who submitted briefs and made oral argument. The sentence of death was affirmed. See *Day v. Wilson*, 2 U.S.C.M.A. 416, 9 C.M.R. 46 (1953). A petition for rehearing was denied.

Pursuant to Article 71(a) of the Uniform Code of Military Justice, 10 U.S.C. § 871(a), the case was sent to the President of the United States for his approval. Appellant's counsel submitted a brief to the President (J.A. 45, 46), who confirmed the conviction and ordered that it be carried into execution under the orders of the Secretary of Army (Ex. H).

In August, 1954, appellant who was confined by the United States Army in Japan filed by civilian counsel a petition for a writ of habeas corpus in the United States District Court for the District of Columbia (J.A. 1). Appellant alleged that "the restraint and imprisonment of the petitioner are illegal being in violation of the Uniform Code of Military Justice and the Constitution of the United States in that the approval of the conviction and sentence by the reviewing authority, the affirmance thereof by the Board of Review and the United States Court of Military Appeals, and the confirmation thereof by the President were had in violation of petitioner's rights as a citizen of the United States and a member of the United States Army." (J.A. 2). In support of such allegation appellant contended he had been denied effective assistance of counsel throughout the military review proceedings (J.A. 2, 3), and that the President had denied him a hearing (J.A. 4). The United States Attorney filed on behalf of respondents a motion to dismiss the petition on the grounds that (1) the District Court lacked jurisdiction to issue a writ because appellant was imprisoned in Japan and (2) the petition failed to state a basis upon which relief might be granted because the court-martial proceedings had been lawful (J.A. 6). The District Court dismissed the petition on the ground that it lacked jurisdiction to issue the writ. See *Day v. Wilson*, H. C. No. 71-54.

Appellant took an appeal to this Court. The prosecution of the appeal was postponed. Appellant was returned from Japan to the United States and confined at Fort Leavenworth, Kansas. He filed in the United States District Court for the District of Kansas a pe-

tition for a writ of habeas corpus. Such petition included all the allegations which had been contained in his petition filed in the United States District Court here. In addition, he alleged that he had been denied his right to have compulsory attendance of witnesses at his court-martial; that his signed confession had been elicited from him illegally; that evidence had been unlawfully admitted at the court-martial trial; that he had been denied a speedy trial; that he had been denied sufficient time to consult with counsel prior to the court-martial; that there had been no proof of the *corpus delicti*; and, that the law officer had failed adequately to instruct the court on a lesser included offense (J.A. 22). The writ was issued, a hearing was held at which appellant testified, and the federal court in Kansas discharged the writ and dismissed the petition. Appellant appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed the order discharging the writ. *Day v. Davis*, 235 F.2d 374 (10th Cir. 1956), *cert. denied*, 352 U.S. 881, *rehearing denied*, 352 U.S. 913.

Appellate proceedings in this Court were revived. In April, 1957, this Court held that the District Court had erred in dismissing appellant's petition on the ground that it lacked jurisdiction and remanded the case. *Day v. Wilson*, — U.S. App. D.C. —, 247 F.2d 60 (1957). Appellant filed in the District Court an amended petition for a writ of habeas corpus in which he alleged in substance that (1) the general court-martial which tried him lacked jurisdiction, (2) he had been denied counsel of his own choice throughout the entire military proceedings, (3) the President improperly denied appellant a hearing and considered matters outside the record when he confirmed appellant's sentence, and (4) that the United States Court of Military Appeals denied appellant due process and equal protection of the law because it affirmed his conviction despite its holdings prior and subsequent thereto that a law officer must instruct a court-martial not only on the elements of the offense charged but also as to the elements of lesser included offenses fairly raised

by the evidence (J.A. 12-16). The United States Attorney filed on behalf of the respondents, who are appellees, a return and answer (J.A. 18). On September 30, 1957, the District Court entered an order that the amended petition be dismissed and the rule to show cause be discharged (J.A. 37), and filed a written memorandum opinion (J.A. 31-37). In such opinion, the District Court concluded (1) that the transfer of court-martial jurisdiction over appellant from the Eighth Army to I Corps was not barred by statute and was not prejudicial to appellant (J.A. 34); (2) that appellant had "had competent counsel in every step of the proceeding both before his conviction and sentence and in all of the proceedings thereafter taken before the several reviewing bodies and every reasonable facility was afforded counsel in that representation." (J.A. 34); (3) that, although appellant had alleged that the United States Court of Military Appeals' affirmance of his conviction had been inconsistent with its other decisions, appellant had failed to cite authority which would give the District Court power "to grant relief by habeas corpus because a decision of an appellate court is inconsistent with other of its decisions" (J.A. 35); and, (4) that appellant had failed to present authority or evidence to support his contentions that he had a right to a personal appearance before the President or that the action by the President was irregular in any respect (J.A. 35-36). Appellant noted his appeal from the District Court's dismissal of his amended petition for a writ of habeas corpus (J.A. 37-38).

STATUTE INVOLVED

Article 22 of the Uniform Code of Military Justice, 10 U.S.C. § 822, provides in pertinent part:

- "(a) General courts-martial may be convened by—
 (1) the President of the United States;
 (2) the Secretary concerned;

- (3) the Commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps . . ."

SUMMARY OF ARGUMENT

When appellant filed his amended petition for writ of habeas corpus, from the denial of which he is now appealing, he was confined by the Army in Kansas. He had access to the federal courts in Kansas and he should have sought relief there. Since he was outside the territorial jurisdiction of the United States District Court for the District of Columbia, the District Court lacked jurisdiction over his petition under the Supreme Court's ruling in *Ahrens v. Clark*, 335 U.S. 188 (1948).

Appellant's unit was under the operational control of and within the area of responsibility of I Corps. The site of the offense and the key witnesses were located in such area. Appellant was tried, convicted and sentenced by a general court-martial convened by the Commanding General of I Corps (General O'Daniel), after the charges against appellant had been referred directly to General O'Daniel for review and approval. Article 22(a) of the Uniform Code of Military Justice, 10 U.S.C. § 822, provides that "[G]eneral courts-martial may be convened by . . . the commanding officer of . . . an Army Corps." The general court-martial which tried, convicted, and sentenced appellant had jurisdiction over his person.

Both the United States Military Court of Appeals and the United States Court of Appeals for the Tenth Circuit examined appellant's contention that the law officer at his court-martial trial had failed to instruct the court-martial as to the elements of lesser included offenses as well as to the elements of premeditated murder and both courts concluded such contention was without merit. Thus the record clearly demonstrates that appellant was not denied due process or equal protection of the laws by the United States Military Court of Appeals.

I.

The District Court Lacked Jurisdiction Over the Amended Petition for Writ of Habeas Corpus Filed by Appellant Who Was at the Time of Its Filing and Is Now Confined in Kansas

Appellant filed in the District Court his amended petition for a writ of habeas corpus and he alleged therein that he "is now unjustly and unlawfully detained and imprisoned under color of the authority of the United States in the custody of the Commandant, United States Disciplinary Barracks, Fort Leavenworth, Kansas." (J.A. 11). (Emphasis supplied.) The Supreme Court has concluded that federal district courts are limited "to inquiries into the causes of restraints of liberty of those confined or restrained within the territorial jurisdictions of those courts." *Ahrens v. Clark*, 335 U.S. 188, 190 (1948). There, the petitioners were aliens held on Ellis Island awaiting deportation to Germany under removal orders issued by the Attorney General pursuant to the Enemy Alien Act. They filed their petition for writ of habeas corpus in the United States District Court for the District of Columbia. They named the Attorney General as respondent and they alleged that at Ellis Island they were under the custody and control of the Attorney General. The respondent moved to dismiss the petition on the ground that petitioners were outside the territorial confines of the District of Columbia and that therefore the District Court lacked jurisdiction. The District Court granted the motion and the Supreme Court upheld the lower court's dismissal of the petition on the jurisdictional ground. Since this decision, this Court has consistently held that the District Court lacks jurisdiction over petitions for habeas corpus where the petitioner is not confined within the District of Columbia. *McAfee v. Clemmer*, 84 U.S. App. D.C. 57, 171 F.2d 131 (1948); *Johnson v. Matthews*, 86 U.S. App. D.C. 376, 381, 182 F.2d 677 (1950); *Taylor v. United States Board of Parole*, 90 U.S. App. D.C. 199, 200, 194 F.2d 882 (1952). See

also, *Goldberg v. Hoffman*, 225 F.2d 463, 467 (7th Cir. 1955); *Crowe v. United States*, 169 F.2d 1022 (4th Cir. 1948). Since appellant is presently, and was at the time of the filing of his amended petition, confined in Leavenworth, Kansas, and since Leavenworth, Kansas, is located not within the territorial jurisdiction of the federal district court in the District of Columbia but rather within the territorial jurisdiction of the federal district court in Kansas, the District Court lacked jurisdiction over appellant's petition and it should have dismissed appellant's petition on this ground alone.

It is indisputable that this Court held that the District Court had jurisdiction over the petition for writ of habeas corpus filed by appellant in August, 1954, when he was being confined in Japan. *Day v. Wilson*, — U.S. App. D.C. —, 247 F.2d 60 (1957). Such a holding was in conformity with a series of decisions by this Court that persons confined by American authorities outside the territorial limits of the United States may file petitions for habeas corpus in the United States District Court for the District of Columbia. *Cozart v. Wilson*, 98 U.S. App. D.C. 437, 236 F.2d 732, *vacated as moot*, 352 U.S. 884; *Eisentrager v. Forrestal*, 84 U.S. App. D.C. 396, 174 F.2d 961 (1949), *reversed on other grounds*, 339 U.S. 763 (1950); and, *Rubenstein v. Wilson*, 94 U.S. App. D.C. 152, 212 F.2d 631 (1954). The rationale of such decisions was that persons outside the United States *could not* under the Constitution be deprived of liberty without having some judicial redress, and, therefore, the federal courts which had territorial jurisdiction over the officials having directive power over the immediate jailer supplied the necessary judicial review. *Eisentrager v. Forrestal*, *supra*, at 401, 402. So, when appellant was held in confinement in Japan by Army authorities in 1954, he had only the United States District Court for the District of Columbia to which to turn for judicial redress and this Court recognized this fact and held that the District Court had had jurisdiction over his petition for habeas

corpus. However, in May, 1957, when appellant filed his amended petition for writ of habeas corpus he was, and had been for sometime, confined in Kansas. Thus, he was not outside the territorial jurisdiction of all federal district courts as he had been in 1954, and there was no need for the United States District Court for the District of Columbia to take jurisdiction of his habeas corpus petition. It is to be noted that when this Court remanded the instant case to the District Court after the first appeal, appellant did not prosecute his original petition any further. Instead, he filed on May 16, 1957, an amended petition which contains several new allegations. Furthermore, he is appealing only from the dismissal of the amended petition (J.A. 37-38). Appellant should have filed this new pleading which raised new matter in the United States District Court for the District of Kansas where he was and is now confined. The Kansas court was the only federal court having jurisdiction over his case.

II.

The General Court Martial Which Tried, Convicted and Sentenced Appellant Had Jurisdiction over Him

At the outset it should be noted that appellant has had his day in court and more. Not only has he had a complete review of his case through the military system, but he has had a hearing by a federal district court in Kansas on all but two of the allegations now pending. He even testified at such hearing. When the relief he sought was denied by the federal district court in Kansas, he took an appeal therefrom. The United States Court of Appeals for the Tenth Circuit thoroughly reviewed his case and decided each and every one of appellant's contentions in a lengthy and complete opinion, and the Supreme Court of the United States declined review of that decision. *Day v. Davis, supra*. It is well established that although the doctrine of *res judicata* does not

apply to habeas corpus proceedings,³ the fact that the same issues before a court have been determined in a former proceeding may be given controlling weight. *Dorsey v. Gill*, 80 U.S. App. D.C. 9, 148 F.2d 859 (1945), *cert. denied*, 325 U.S. 890 (1945); *Jordon v. Clemmer*, 80 F. Supp. 539 (D.C. 1947); *Swihart v. Johnson*, 150 F.2d 721 (9 Cir. 1945), *cert. denied*, 327 U.S. 789; *Guttermann v. Hiatt*, 65 F. Supp. 285 (M.D.Pa. 1946). A court has a right to protect itself from a pertinacious relator, *United States ex rel. Gregoire v. Watkins*, 164 F.2d 137 (2 Cir. 1947); *United States ex rel. Skaikas v. Shaughnessy*, 115 F. Supp. 165 (S.D.N.Y. 1953). It should also be noted that the United States Court of Appeals for the District of Columbia Circuit stated in *Day v. Wilson*, *supra*, that this District Court should give great weight to the Kansas proceedings. Apparently, appellant is aware of, and therefore seeks to avoid, the decisions cited above for he now raises two matters not alleged in any of his previous petitions for a writ of habeas corpus. He gives no reason why he has not made use of the innumerable opportunities he has had heretofore for raising such matters. Obviously, it amounts to a clutching at straws.

Appellant contends that "the general court-martial which tried, convicted and sentenced him was without jurisdiction over his person in that the convening authority of the said general court-martial lacked general court-martial jurisdiction over him" (App. Br. at 9). It is interesting to note what appellant does *not* urge in support of his contention. He does not argue that the

³ Cf. Report of Judicial Conference, September Session, 1943, p. 22, wherein the habeas corpus committee, headed by Judge Parker, recommended legislation to apply the doctrine of *res judicata* to habeas corpus proceedings. See also, *Use and Abuse of the Writ of Habeas Corpus*, by Federal District Judge Louis E. Goodman, 7 F.R.D. 313 (1947).

It should also be noted that the doctrine of *res judicata* has been applied to the statutory substitute for habeas corpus (28 U.S.C. § 2255). Public policy requires that there should be an end to litigation and litigants are entitled to protection from harassment by attempts to relitigate questions already finally determined. *Lipscomb v. United States*, 226 F.2d 812 (8 Cir. 1955).

membership of the court-martial was deficient in any respect, or that he was not subject to trial by a court-martial, or that the court-martial lacked jurisdiction over the offense for which he was tried and convicted. Appellant does not, and indeed he could not, urge on appeal that the Commanding General of I Corps was without authority to convene a general court-martial because Article 22(a) of the Uniform Code of Military Justice, 10 U.S.C. § 822, provides in pertinent part that "[G]eneral courts-martial may be convened by . . . the commanding officer of . . . an Army Corps." Appellant's sole argument in support of his contention that the general court-martial which tried, convicted and sentenced him lacked jurisdiction over him is that the *charges* against him were invalidly transferred from the Commanding General of the Eighth Army to the Commanding General of I Corps. Thus, appellant says (App. Br. at 10):

"Article 22 [of the Uniform Code of Military Justice] vests jurisdiction to convene general courts-martial in the commanding officers of both an Army and an Army Corps. Where, however, charges against an accused are duly forwarded to the commanding officer of an Army, the commanding officer of an Army Corps, a subordinate command, then can have no jurisdiction to convene a general court-martial for the trial of an accused on those particular charges."

Appellant claims that the subsequent convening by General O'Daniel of I Corps of the general court-martial which tried, convicted and sentenced appellant was invalid, and, therefore, the court-martial proceedings were null and void.

Appellant's contention is without support in fact or law. The original charges against appellant, drawn up in May, 1951, did come in due course to General Van Fleet for review and approval (J.A. 40). Such charges were referred by his Staff Judge Advocate to General O'Daniel of I Corps pursuant to a standard operating procedure followed in all cases at that time in Korea

designed to facilitate the administration of justice (J.A. 41). In August, 1951, such charges were withdrawn against appellant because they were defective (R. 56). Subsequently, the charges upon which appellant was brought to trial were drawn up, investigated and referred *directly* to the Commanding General of I Corps and his Staff Judge Advocate for review and approval (R. 61). General O'Daniel approved the charges and convened a general court-martial (J.A. 41). Thus, the charges upon which appellant was tried by a general court-martial were not transmitted by General Van Fleet to General O'Daniel. Thus, there was not an invalid transfer prior to the convening of appellant's court-martial by General O'Daniel. Consequently, appellant's argument that the court-martial which tried him lacked jurisdiction and that his conviction is void must fail.

Even assuming *arguendo* that the charges upon which appellant were tried were transmitted from the Commanding General of the Eighth Army to the Commanding General of I Corps, it could not be said that the latter lacked jurisdiction to convene a general court-martial to try him on such charges. The commanding officer of an Army Corps has express authority to convene a general court-martial pursuant to U.C.M.J. 22(a), 10 U.S.C. § 822. If Congress had intended that such authority be limited to cases in which the commanding officer of an Army Corps received the charges directly, it would have said so. Such a severe limitation as appellant would put upon the commanding officer's authority to convene general court-martials must be expressly stated in order to be recognized. Such limitation may not be inferred from "striking silence," as appellant would have it (App. Br. at 11). Under appellant's theory, the authority of each of the commanding officers enumerated in Article 22 to convene general courts-martial would depend upon whether charges happened to be sent to him first. Thus, appellant would have general court-martial jurisdiction vested not according to the Uniform Code but according to chance. Appellant seeks to sup-

port his position by referring to Uniform Code of Military Justice, Art. 22(b), 10 U.S.C. § 822(b), which provides in pertinent part:

“When any such *commanding officer* [enumerated in subsection (a) as having authority to convene general courts-martial] is an *accuser*, the court shall be convened by superior competent authority, and may in any case be convened by such authority when deemed desirable by him.” (Emphasis supplied.)

The obvious purpose of this subsection is to eliminate the command influence and to insure a fair court-martial trial. Obviously, if the commanding officer is the accuser in a case, the general court-martial should be convened by the commanding officer's superior. No such situation existed or is alleged to have existed in the instant case.

The transfer of charges from one commanding officer vested with authority to convene to another such officer vested with similar authority is often required in the interests of justice by tactical situations. For example, in the instant case, appellant's battalion was an Eighth Army unit and, consequently, the initial charges were forwarded to Eighth Army Headquarters. However, appellant's battalion was under operational control of I Corps and within the I Corps area of responsibility. The Headquarters of I Corps were located near the scene of the offense. The Headquarters of the Eighth Army were some 175 miles from the situs of the crime. Several key witnesses were living in Seoul. (J.A. 30.) Thus, the transmission of charges from General Van Fleet to General O'Daniel was to serve the ends of justice not defeat them, and was dictated by the tactical situation existing in September, 1951. In *Wade v. Hunter*, 336 U.S. 684 (1949), the Supreme Court approved the transfer of charges for tactical reasons by one commanding officer to another, *even where the court-martial convened by the former had heard all the evidence and closing argument by counsel*. In upholding the conviction of the accused against his contention that he had been put in double jeopardy, the Supreme Court stated (at 692):

"At least in the absence of charges of bad faith on the part of the Commanding General, courts should not attempt to review his on-the-spot decision that the tactical situation required transfer of the charges."

Appellant made no allegation in his amended petition of bad faith on the part of General Van Fleet in transferring the charges. Indeed, the record reveals the exact reasons for such transfer. It was designed "to facilitate the orderly and expeditious administration of military justice", in that trial by I Corps would mean a trial at the scene of the offense and near the location of key witnesses (J.A. 30).

Appellant also contends that the transfer of his case was unlawful because the Commanding General of the Eighth Army did not personally order the transfer, but that it was done, over his command line, by his Staff Judge Advocate. (App. Br. 13-15). It should be noted that the transfer was effected under the command line of General Van Fleet (J.A. 41). This indicates that the decision to transfer the matter, although initiated and processed by the Staff Judge Advocate, was the decision made and approved by the Commanding General of the Eighth Army. The United States Court of Military Appeals has held in many instances that a commander may not go behind his own command line. *United States v. Haimson*, 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954); *United States v. Greenwalt*, 6 U.S.C.M.A. 569, 20 C.M.R. 208 (1955). A determination as to where, and which command will try accused, cannot be characterized as judicial in nature. It is a purely administrative function, normally performed by a staff officer in accordance with the standard operating procedure established by the commander. At this point, it is interesting to note that appellant does not attack the standard operating procedure established by the Commanding General, Eighth Army "designed to facilitate the orderly and expeditious administration of military justice." (J.A. 30). This Court may take judicial notice of the fact that the United States Army has authorized the use of standard operating procedures for many years and that innumerable staff

functions take place under the command line of the appropriate authority without his personal knowledge, but which are nevertheless his act. Neither the Uniform Code of Military Justice, nor the Manual for Courts-Martial require that a commander personally perform such routine functions. The determination to refer the matter to I Corps was not a decision to refer the charge for trial. The record before this Court clearly shows that the decision to convene a general court-martial was made by the Commanding General of I Corps (J.A. 41).

III.

Appellant Was Afforded Due Process and Equal Protection of the Laws by the United States Court of Military Appeals.

Appellant complains that the United States Court of Military Appeals, in reviewing the record of trial, failed to recognize the mandate of the statute and its own prior decisions that the law officer must have instructed the court-martial as to the elements of the lesser included offense of unpremeditated murder (App. Br. at 16). An examination of the opinion of the Military Court of Appeals reveals that such Court did recognize that the law officer must instruct on the lesser included offenses of premeditated murder and that the court did conclude that such instruction was given. The Court said:

"The principal complaint lodged against the instructions by appellate defense counsel is the failure of the law officer to instruct on the lesser included offenses of premeditated murder. The only included offenses of premeditated murder which need to be mentioned are voluntary or involuntary manslaughter, negligent homicide and unpremeditated murder. That the first three are not reasonably raised by the evidence is obvious from our recitation of fact. There is not even a trace of evidence that the killing was occasioned by any degree of negligence, and the record is barren of any hint of justification or excuse for the killing. The only instruction needed then was on unpremeditated murder. We think there was, for all practical purposes, such an instruction given.

"We have pointed out that the court members were fully informed on the elements of premeditated murder. The only difference between the crime of premeditated murder and unpremeditated murder is the element of premeditation. If this element was found, the accused is guilty of the greater crime; if it was not found, he was guilty of the lesser. As a matter of fact, the only difference between the elements of the two degrees of murder can be determined solely from the names given the two crimes. The question is, however, was the court-martial aware of the difference and did the members know they could return a verdict of guilty of the lesser offense?

"If there was any reason for the offense of unpremeditated murder being in issue, it was because of the fact that there was some testimony that accused had been drinking. The law officer recognized the possibility of drunkenness affecting mental capacity and he, therefore, gave the following instruction:

"The court is further referred to paragraph 154, subparagraph (2), Manual for Courts-Martial 1951, for a discussion of voluntary drunkenness as affects intent. I quote:

"A temporary loss of reason which accompanies and is part of a drunken spree and which is not the result of delirium tremens or some other mental defect, disease, or derangement is not insanity, in the legal sense. It is a general rule of law that voluntary drunkenness not amounting to legal insanity, whether caused by liquor or drugs, is not an excuse for crime committed while in that condition; *but such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a necessary element of the offense.*" [Emphasis supplied]

This instruction was preceded by one which told the court members that unpremeditated murder was an included offense of premeditated murder. They were further instructed that if they had a reasonable doubt as to the degree of the crime, the finding must be in a lower degree as to which there was no doubt. The instructions must be interpreted as a whole and when this is done we fail to see how, or in what way,

the court-martial was misled, confused or under-instructed. While the legal concepts may not have been spelled out with the niceties sometimes found in civilian cases, we are satisfied the instructions were of sufficient completeness and clarity that any reasonable man would be able to ascertain, with little difficulty, the elements making up the two respective offenses. Perhaps a good test can be found in the clarity with which counsel presented the principles to the court-martial. A quick look at the arguments will establish with conviction the premise that all parties at the trial level understood the rule that intoxication could be used as a defense to premeditation or specific intent to kill to the extent that the crime charged could be reduced to murder unpremeditated."

Subsequently, the United States Court of Appeals for the Tenth Circuit stated in *Day v. Davis, supra*, at 385:

"We think the charge of the Law Officer made it perfectly clear that the lesser offense of unpremeditated murder was included in the greater offense. As stated above, the basis of that issue was the alleged intoxication of Day. The Law Officer correctly and fully instructed as to the consideration to be given drunkenness as affecting mental capacity to premeditate or entertain a specific intent. Clearly, any deficiencies in the instructions are not of a character that presents a question open to review in habeas corpus."

It is submitted that appellant was not deprived of any constitutional right by reason of the review afforded his trial record by the United States Court of Military Appeals.

CONCLUSION

Wherefore, it is respectfully submitted that the order dismissing appellant's amended petition for writ of habeas corpus be affirmed.

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